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BRIEF OF APPELLEES

3491

v. 3491

IN THE
UNITED STATES COURT OF APPEALS
NINTH CIRCUIT

No. 22749 ✓

HOWARD ELECTRIC CO., a Colorado Corporation
Appellant,

vs.

INTERNATIONAL BROTHERHOOD OF
ELECTRICAL WORKERS LOCAL UNION
NO. 570 and INTERNATIONAL BROTHERHOOD
OF ELECTRICAL WORKERS,

Appellees.

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FILED

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UNITED STATES COURT OF APPEALS

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HOWARD ELECTRIC CO., a Colorado Corporation
Appellant,

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BRIEF OF APPELLEES

PREFATORY STATEMENT

For convenience, Appellant Howard Electric Company will be referred to as "Howard." The International Brotherhood of Electrical Workers (an International Union) has by amended complaint been removed as a party defendant. Therefore, for convenience, both the local union, International Brotherhood of Electrical Workers Local Union No. 570, and the International Brotherhood of Electrical Workers named as Appellees herein, will be referred to as "Local Union."

Reference to the Transcript of Record of the Clerk of this Court (Volume One of same) will be "RC-" (page number following.) Reference to the Reporter's Transcript of Proceedings (Volume Two of the Transcript of Record) will be "RT-" (page number following)

STATEMENT OF THE CASE

In its Statement of the Case Howard did not present all the facts elicited before the Court below, upon which the Court based its findings and the order from which Howard appeals.

Howard's complaint against Local Union alleges in part:

"Under the terms of the collective bargaining agreement, the parties agreed under Article I, Section 4 that there shall be no stoppage of work either by strike or lockout because of any dispute over matters relating to this agreement.

". . . Defendant local ordered and coerced employees of Plaintiff to cease working for Plaintiff, and in accordance with said action by said defendant, said employees walked off the job and ceased working for the Plaintiff.

". . . Defendants have failed and refused to return said employees or furnish employees to these projects in violation of the collective bargaining agreement," and prayed for actual and exemplary damages for such alleged breach of contract.

In its motion for stay of proceedings Local Union incorporated the affidavit of Horace Bounds, its business manager. Such affidavit, uncontroverted by Howard, stated in part:

". . . . a dispute arose under said agreement in reference to the referral of employees for employment by plaintiff, as set forth in said agreement and led to the alleged work stoppage referred to in said complaint; that as a result of said dispute and without sanction of the local union and through no action or fault of the local union, some employees of plaintiff

did leave the employment of plaintiff; that plaintiff did, through its agent, the Arizona Chapter, Tucson Division National Contractors' Association, utilize the procedure set forth in Article I to settle such dispute, by requesting a joint Conference Committee meeting for September 5, 1967; that shortly before such meeting plaintiff requested cancellation of such meeting, and instituted its present action; that defendants were at all times and still are willing to abide by the arbitration procedure set forth in Article I of such agreement; that in answer to said action defendants specifically deny that they have instigated said strike or work-stoppage against plaintiff or have encouraged its members not to work for plaintiff."

Article I of Section 4 of the agreement states:¹

"There shall be no stoppage of work either by strikes or lockout because of any proposed changes in the Agreement *or disputes over matters relating to the Agreement. All such matters must be handled as stated herein.*" (Italics supplied)

The article provides a complete system of arbitration. Section 5 of such article sets up a Joint Conference Com-

¹ Article I is set forth in full, Local Union's Memorandum in Support of Motion to Stay Proceedings. (RC-10)

Page 2 of Howard's brief states that Local Union "specifically admit the allegations of the complaint as being true." Such is not the case. Local Union's motion generally admitted the allegations of the complaint for the purpose of conceding the walkout or wild-cat strike but the uncontroverted affidavit of Local Union's business agent (made part of the motion) specifically denied the material parts of the complaint (RC-25). The District Court took the same view:

"Mr. Schneier's motion or his concession for the purposes of the motion, but I am going on Mr. Bound's affidavit which I think being specific must be controlling here because it deals with the very question here. Mr. Schneier concedes certain things, that there was a work stoppage, I believe." (RT-16)

mittee consisting of three representatives of the Union and three representing the Employer. Section 6 of such article states:

“All grievances or questions in dispute shall be adjusted by the duly authorized representatives . . .”

Section 7 of such article states such questions shall be settled by a majority vote, with such decision becoming final and binding. Section 8 states that upon failure of the Committee to agree the matter is referred to a national council for decision.

Upon a hearing on Local Union's Motion to Stay Proceedings, the District Court entered its order staying Howard's action, and found:

“There is a dispute . . . as to whether defendants breached Section 4 of Article I of the agreement [no-strike clause], by causing, ordering and coercing plaintiff's employees to cease working for plaintiff, and whether defendants engaged in a strike against plaintiff;

“There is a dispute . . . as to whether defendants violated said agreement by failing to furnish employees to plaintiff's projects;

“Such disputes are disputes regarding matters relating to said agreement, and as such are arbitrable matters under said agreement . . .”

QUESTION INVOLVED

The basic question involved is whether it can be said with positive assurance that the arbitration clause set forth in the agreement is not susceptible to an interpreta-

tion that covers the alleged disputes between Howard and Local Union.²

SUMMARY OF ARGUMENT

Article I, Section 4, states in unambiguous clear-cut language that there shall not be any "work-stoppage or lockout because of . . . or disputes over the matters relating to the agreement." Howard states that by Local Union's causing a strike and that by Local Union's failing to furnish men to man its jobs it suffered damages. Local Union denies the same, and states disputes have arisen under the collective bargaining agreement which must be settled by the arbitration processes under the agreement.

ARGUMENT

In 1960 the United States Supreme Court in a trilogy of landmark cases set forth the role of the judiciary in enforcing arbitration as a means of giving effect to the arbitration process, and effectuating congressional intent.

The foundation of Federal substantive law in this field lay in *Textile Workers v. Lincoln Mills*,³ significant in that it established broad and effective remedial powers for the federal courts in order to enforce private commitments to arbitrate. Soon followed a trilogy of decisions⁴

² *United Steelworkers of America v. Warrior and Gulf Navigation Co.* 363 U.S. 574: "An order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

³ 353 U.S. 448 (1957).

⁴ *United Steelworkers v. Warrior and Gulf Navigation Co.* 363 U.S. 574 (1960); *United Steelworkers v. Enterprise Wheel and Car Corp.* 363 U.S. 593 (1960) and *United Steelworkers v. American Manufacturing Company* 363 U.S. 564 (1960).

that fashioned a system of standards to guide the courts in the matter of determining questions involving arbitrability of labor disputes. It led this Court, among others, to adopt a broad premise:

“ . . . But to rule a controversy not arbitrable on scant evidence falling short of a clear demonstration of that fact would set at naught the equal important policy enunciated in the Steelworkers trilogy {citing cases n. 4 herein} to arbitrate all disputes not clearly outside the arbitration clause.”⁵

Standards set by the United States Supreme Court in the trilogy and subsequent decisions mandate the lower courts prior to ordering arbitration, to determine among other things: Is there a collective bargaining agreement which obligates the parties to invoke the arbitration processes?⁶ Is so, does such agreement provide for arbitration? Is there a claim that the provision of the contract is being violated? Is there a mutual obligation to invoke the arbitration processes, or is it limited just to one of the parties?⁷ Finally, (the crux of the present case) where there is a no-strike clause, is the arbitration clause subject to being broadly construed or is it limited by specific provisions

⁵ *Association of Industrial Scientists v. Shell Development Co.* 348 (F.(2d) 385, 9th Circuit. “In the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail, particularly where, as here, the exclusion clause is vague and the arbitration clause quite broad.” *Warrior*, n. 2.

⁶ *Las Vegas Local Joint Executive Board of Culinary Workers v. Las Vegas Hacienda*, 9th Circuit, No. 21, 349. September 27, 1967. 383 F.(2d) 667. Defendant was not a party to a collective bargaining agreement: no duty to arbitrate.

⁷ *Atkinson v. Sinclair Refining Company* 370 U.S. 238. No duty to arbitrate: “. . . the article expressly provides that arbitration may be invoked only at the option of the union . . .”

which excludes the dispute from arbitration, and thus negates the intention to condition the duty to arbitrate upon the absence of strikes?⁸

In the instant case it is apparent that the standards have been met: There is a collective bargaining agreement between the parties; Howard claims that provisions of the agreement have been violated by Local Union; the agreement provides for binding arbitration; the obligation to arbitrate is mutual.⁹

Thus, in the court below Howard was left with the same argument it is making here. Its argument below was:

1. The Local Union lost its right to arbitration because it caused a work stoppage; the *quid pro quo* for arbitration was the no-strike clause;

2. The arbitration clause should not be broadly construed because the:

“very fact that the no-strike clause and the word ‘dispute’ are mentioned in the same sentence shows that one does not include the other,”

and therefore Howard’s claim should be excluded from arbitration.¹⁰

The “Quid Pro Quo” Argument

The *quid pro quo* argument was given little effect in

⁸ *Drake v. Bakery Workers* 370 U.S. 254 (1962): “. . . by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes.”

⁹ Article I, Section 4: “. . . no stoppage of work either by *strike or lockout* . . . all such matters must be handled as stated herein.” (italics supplied) (RC-10)

¹⁰ RT-19; Howard’s Brief, p. 8.

the *Drake Bakeries* case.¹¹ There the United States Supreme Court held:

“. . . Moreover, in this case, under this contract, *by agreeing to arbitrate all claims without excluding the case where the union struck over an arbitrable matter, the parties have negatived any intention to condition the duty to arbitrate upon the absence of strikes.* They have thus cut the ground from under the argument that an alleged strike automatically and regardless of the circumstances, is such a breach or repudiation of the arbitration clause by the union that the company is excused from arbitrating, upon theories of waiver, estoppel, or otherwise. Arbitration provisions, which themselves have not been repudiated, are meant to survive breach of contract, in many contexts, even total breach, and in determining whether one party has so repudiated his promise to arbitrate that the other party is excused, the circumstances of the claimed repudiation are critically important. In this case the union denies having repudiated in any respect its promise to arbitrate, denies that there was a strike, denies that the employees were bound to work on January 2 and asserts that it was the company itself which ignored the adjustment and arbitration provisions by scheduling holiday work . . .” (Italics supplied)

In order to distinguish the instant case from *Drake* Howard makes the statement:¹²

“In the present case, unlike the *Drake* case, the Union repudiated the very disputes procedure it now seeks to invoke . . .

“No such circumstances are present in the instant case. The Union had a dispute to be taken to arbitration. This it did not do, but it engaged in an illegal

¹¹ 370 U.S. 254 (1962).

¹² *Howard's Brief*, pp. 9 and 10.

strike in violation of the contract. No such mitigating circumstances as are present in *Drake* have been shown in our case nor indeed are present."

Such statement is not factual. The Local Union did exactly what the union did in *Drake*. By its agent's uncontroverted affidavit,¹³ the Local Union denied such illegal strike. Such affidavit further alleged that it was Howard, not the Local Union, that refused to go into arbitration. It was Howard that cancelled the arbitration meeting set up for the purpose of resolving the disputes, one of which led to a wildcat strike.

In *Drake, supra*, the contract had what is commonly referred to as a "broad clause":

"The parties agree that they will promptly attempt to adjust all complaints, disputes or grievances arising between them involving questions of interpretation or application of any clause or matter covered by this contract or relations between the parties hereto, directly or indirectly."

The Local Union contends that its clause in question is as broad as that in *Drake*. Such clause on its face states that there shall be no work stoppage because of . . . "disputes over the matters relating to the agreement." Local Union states that a dispute arose because of Howard's breach of the agreement, which led to a wildcat strike. Howard's complaint states that, contrary to the agreement, Local Union coerced and caused its members to strike. Local Union says it did not. Howard states Local Union, contrary to the agreement, refused to refer it men to man the jobs. Local Union says it did not.

Clearly, these are "disputes arising over matters relating to the agreement." The District Court so found.

¹³ Attached to Motion to Stay and made part thereof. (RC-25)

Howard's "Exclusion" Argument

As stated in *Drake* the exclusion must be clearly stated. As stated in *Warrior*¹⁴ it must be found "with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."

The rationale of both cases is found in *Los Angeles Bag Company v. Printing Specialties*¹⁵ a Ninth Circuit case. The Court below cited the case in answering Howard's *quid pro quo* and "exclusion" argument. The following colloquy took place between Howard's counsel and the District Court.

MR. AISENBERG: We would contend this: That whether or not the Union instigated the strike is not a dispute over matters relating to this agreement. How does it affect this agreement whether the Union instigated the strike or not?

THE COURT: Because you are claiming a breach of the contract, saying they did. The Union says we did not call a strike. There is a dispute between you as to whether there was a violation of the contract, there was a breach of the terms of the contract. And this says: All disputes as to matters relating to the agreement must be handled as stated therein, must be handled by arbitration. All disputes as to matters relating to the agreement, is my interpretation of the meaning of paragraph 4 of Article 1. As I see it, that is precisely what you are disputing about here is whether or not there is a breach of that.

MR. AISENBERG: Isn't though a breach of the contract by strike or lock-out a matter divorced from arbitration proceedings by the very language of the clause itself? It renders the clause meaningless. If you

¹⁴ n. 2.

¹⁵ 345 F.(2d) 757 (1965).

can take to arbitration the matter of a work stoppage or strike, you render this Section 4 of Article 1 meaningless.

THE COURT: There are any number of cases that do hold precisely that you do take them to arbitration.

MR. AISENBERG: On different clause. We have got the Drake Bakery case —

THE COURT: Well, that is the Los Angeles Paper case, which says—here is the agreement in Los Angeles: Issues subject to the grievance procedure are limited to differences arising out of the interpretation, application or alleged violation of any of the express provisions of this agreement.

MR. AISENBERG: I believe the language is different. I believe the key thing in this, Your Honor, if I may submit, is that we have in the same clause—it sounds to me like it is a quid pro quo, one for the other, there shall be no strike because of a dispute.

THE COURT: We will go this far. That was in the Los Angeles Paper Bag case. There was a no-strike clause or illegal work stoppage and that provision was there. Then we have this further language that all grievances relating to the interpretation, application or alleged violation of any of the express provisions of this agreement. And the question was, as I read the case, whether there was an illegal walk-out—it says: From the beginning and throughout this case, the employer has unilaterally assumed that an unauthorized, that is, an illegal walk-out or work stoppage took place on August 17th. If such assumption were true in fact, then the acts of the employees in leaving the work would clearly be stoppage in violation of the agreement and the matter of discharge thereafter would be subject to discipline and would not be a basis for grievance procedure within the meaning of Article 2. Unfortunately for the employ-

er's position, the agreement does not have any clause giving the employer an absolute, uncontestable unilateral right to decide whether the strike or unauthorized work stoppage has in fact occurred. There is nothing in the agreement, however, which prevents the employer from making such an initial assumption when the work stoppage has taken place and proceeding to act thereon. Nevertheless, if this was done here, the employees affected by the employer's claim of unauthorized work stoppage challenge the factual truth of such assumption by filing a claim of grievance, then an issue is presented which under the agreement must be submitted to arbitration.

That language to me is rather applicable in this situation. And here, as there, the employer is just assuming that there was an illegal work stoppage. As the Court points out, that is fine if you do that in the first instance. But when it is challenged, then you have a dispute that has to be settled by arbitration.¹⁶

To sustain arbitration in *Los Angeles Paper Bag, supra*, this Court had to overcome the language of an exclusionary clause. In that case the employer contended that there was no duty on its part to arbitrate any matter involving discipline of an employee where there was a strike or stoppage of work, and where such discipline consisted of discharge. In the face of the union's contention that under the contract an employee could be discharged only for just cause, the employer relied on the exclusionary clause:

“. . . but such discharges {for discipline} will not be subject to the grievance procedure and arbitration.”

This Court found that the ultimate issue was whether there was an illegal work stoppage. But that was for the

¹⁶ RT-18, 19, 20.

arbitrator to decide. If the arbitrator found such stoppage, that was the end of the matter. But if the arbitrator found no such stoppage, there was a remaining issue to be determined: Whether the discharge was for just cause.

The important principle found in *Los Angeles Paper Bag* is that this Court did preserve an arbitrable issue (discharge without just cause) in the face of an exclusionary clause, and resolved any doubt in favor of arbitration. In the instant case there is no exclusionary clause.

*Desert Coca Cola Bottling Company v. General Sales Drivers*¹⁷ another case decided in this circuit, further points up the fact that arbitration will be ordered if there can possibly be any dispute to be so resolved.

In *Desert Coca Cola* the collective bargaining agreement contained an arbitration clause providing for the arbitration of grievances, and a no-strike-no-lockout clause because of any controversy, dispute or disagreement. An exclusion clause provided:

"It is understood that the above shall not apply in any way concerning wages."

A dispute arose as to whether driver-salesmen should be paid overtime pay if they worked more than 40 hours a week. The union contended the exclusion clause removed from arbitration the question of overtime pay since the dispute was a dispute concerning "wages."

This Court, citing the trilogy and *Warrior*¹⁸ cases, stated that any doubt must be resolved in favor of coverage by the machinery of arbitration. It found that various situations could arise wherein a driver-salesman could

¹⁷ 335 F. 2d 198 (1964).

¹⁸ n. 4 and n. 2.

dispute the question of allocation of his hours of employment marshalled into one week of employment which might result in a different compensation over a two week period, if such hours were not so allocated. Thus such situation might concern compensation but not affect wages:

“In other words, can a dispute affect compensation without affecting wages? We think it can fairly and honestly be thought that it can. We cannot hold that the term is ‘clear and unambiguous’ or say ‘with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute.’”¹⁹

The same principle was set forth in a Ninth Circuit Case, *Operating Engineers, Local 3 v. Crooks Bros. Tractor Company*.²⁰ In that case an employee was discharged for insubordination for refusing to take a job assignment outside his bargaining unit. One part of the agreement provided:

“No employee shall suffer discharge without just cause, provided, however, the Employer shall be the sole judge of the qualifications of its employees . . . In the event of a dispute, the existence or non-existence of just cause shall be determined as provided in Section X of the agreement.”

Section X provided for arbitration. The District Court held that insubordination bore on the worker’s

¹⁹ The Court stated the “clear and unambiguous” test is the second circuit’s verbalization of the test laid down by the Supreme Court. *Carey v. General Electric Co.* (1963) 315 F. 2d 499, 506, cert. denied 377 U.S. 908. Every grievance is arbitrable under a broad and comprehensive labor arbitration agreement unless the parties have shown by clear and unambiguous language in the contract that a particular dispute is not subject to its provisions.

²⁰ 295 F.(2d) 282 (1961).

qualifications and that the discharge was for grounds upon which the employer had reserved the right to act as sole judge. Therefore, the dispute was not one which the employer had agreed to submit to arbitration.

This Court held:

“Whether ‘qualifications’ is to include such matters as insubordination or is to be confined to such matters as skill, experience and physical condition is, at best, a debatable question. The intention to exclude from arbitration the dispute here involved does not, we are satisfied, appear from the face of the contract with the clarity which is essential.”

In reversing, the Court adopted the language of *Warrior* stating that in the absence of any express provision excluding a particular grievance from arbitration, only the “most forceful evidence of a purpose to exclude the claim from arbitration can prevail.”

For a recent case involving almost identical facts and grievance procedure as the instant case, the 7th Circuit considered the question of arbitration in *Pietro Scalzitti Company v. International Union of Operating Engineers*.²¹ In that case the employer sought to recover damages claimed to have resulted from an alleged breach of a no-strike clause, claiming, as in the instant case, that the union members struck the job, and the union refused to furnish employees. As a result, it could not finish its job and was damaged.

The union as here, demanded arbitration; the employer refused. In its supporting affidavit, the union did

²¹ 351 F.(2d) 576 (1965).

not deny the walkout, nor did it deny it failed to furnish employees, but denied it violated the agreement.²²

The 7th Circuit took the union's *legal conclusion* that it did not violate the agreement:

“... to mean that Union denies responsibility for the strike²³ and denies it was required by the agreement to furnish Company with employees after the walkout.”

The Court found that the collective bargaining agreement provided:

1. No employee shall leave the job without giving notice to his Employer and the Union;
2. No work stoppage by the union officers and business representatives until all of the procedures set forth in the agreement were exhausted;
3. Any difference or dispute arising as to interpretation or application of the terms of the agreement should be resolved by arbitration.

The employer's position was essentially the same as Howard's: a breach of the no-strike clause, and therefore the issues of fact are properly triable only by the District Court.

In sustaining the District Court's order staying the

²² In the instant case Local Union's affidavit not only stated the walkout was not its fault, but denied specifically that it instigated the work-stoppage or encouraged its members not to work for the employer.

²³ Howard claims that because “work-stoppage” is not modified by the phrase “in violation of this agreement” as in *Los Angeles Paper* then all work stoppages are non-arbitrable. Its brief, p. 17. In *Pietro Scalzatti* the Court holds a mere denial of a violation is enough to raise the issue. (That case had no such clause modifying “work stoppage.”)

action pending arbitration the 7th Circuit cited *Drake*, and *Steelworkers v. American Mfg. Co.*²⁴

“The Court said in the latter case, ‘The function of a court is very limited when the parties have agreed to submit all questions of contract interpretation to the arbitrator. It is confined to ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract.’ ”

In construing the scope of the arbitration agreement, the 7th Circuit held:

“While the contract language before us may not be wholly identical to the arbitration clause in *Drake Bakeries*, yet the instant contract excludes nothing from arbitration and clearly falls within the rationale of *Drake Bakeries*. The contract in question in the present case requires arbitration when ‘any difference or dispute shall arise as to the interpretation or application of the terms of this agreement . . .’ ”

It is submitted that the clause in the instant case which requires arbitration of “disputes over the matters relating to the agreement,” is as broad if not broader as that contained in *Pietro Scalzitti Company*, supra.

When compared with the Ninth Circuit cases of *Los Angeles Paper Bag*, *Desert Coca Cola* and *Operating Engineers, Local 3 v. Crooks Brothers*, supra, each containing a restrictive clause, the instant clause falls well within the premise set forth in this Court’s recent pronouncement in *Association of Industrial Scientists v. Shell Development Co.*²⁵

“ . . . to rule a controversy not arbitrable on scant evidence falling short of a clear demonstration of that fact would set at naught the equal important policy

²⁴ 363 U.S. 593 (1960).

²⁵ n. 5.

enunciated in the Steelworkers trilogy to arbitrate all disputes not clearly outside the arbitration clause."

Local Union submits that it has met all of the standards of substantive law laid down by the United States Supreme Court, in its mandate to the lower courts: resolve any doubt in favor of arbitration. Once it is apparent on the face of the collective bargaining agreement that there is a clause providing for arbitration of a dispute arising under the agreement, that there is mutuality of arbitration, that a dispute has arisen under the agreement, and that there is a binding arbitration process, the court loses jurisdiction over the merits of the dispute even in the face of a no-strike clause, unless the dispute is clearly excepted by an exclusionary clause.

The instant clause is free from ambiguity; there is no exclusionary clause. It states simply and clearly that if there is any work stoppage because of any dispute arising under the collective bargaining agreement, such dispute shall be resolved by arbitration: "All such matters must be handled as stated herein." The Court found that there were such disputes arising under the agreement.

In the instant case the lower court did not have to search for any remaining issues as found in the Ninth Circuit cases cited herein. In fact, there was no doubt to be resolved in favor of arbitration.

CONCLUSION

In its brief Howard has attempted to rationalize the semantics of the instant clause, stating the clause is meaningless and should not be given effect. What Howard is really stating is that it does not like the present state of the law.

Howard would like to have this court go back to the law before the Trilogy (1960) and *Drake Bakery* (1962). The cases it cites in support of its position that violations of a no-strike clause are *ipso facto* not arbitrable, are no longer authoritative.²⁶

If Howard wanted a breach of a no-strike provision remedied in Court it should have negotiated a collective bargaining agreement to that effect:

"If the no strike provision of the contract was so fundamental and so basic to the company as not to be subject to arbitration, it was reasonable to expect that it would have been expressly excluded from the comprehensive language of the arbitration provision, if the parties so intended.

"In other words, if an employer wants a breach of a no-strike provision prevented or remedied in court, rather than resolved in arbitration, it is up to

²⁶ Howard's brief, pp. 12 and 13. e.g.: decided in 1954, 1956, 1957 and 1959. p. 19, 1957; p. 20, 1959. Howard makes the interesting contention (its brief, p. 11) that Section 9 of Article 1 of the Agreement is a "*condition precedent*." When a matter in dispute has been referred to arbitration "provisions and conditions prevailing prior to the time such matters arose shall not be changed or annulled;" i.e. that since there was a walkout, Local Union has no right to arbitrate. In support of this argument it cites *International Union v. Benton Harbor Malleable Industries*, 242 F.(2d) 356 a 6th Circuit Case decided in 1957, (its brief pp. 12, 13) the rationale of which is directly contra to *Drake Bakeries* (1962). A literal reading of Section 9 clearly shows that by bringing a dispute into arbitration, neither party can retaliate against the other by changing the provisions and conditions of the agreement. If, after bringing the matter into arbitration either party changes the terms, such section provides a new subject for arbitration. (Howard never took advantage of the section; it refused to arbitrate in the first instance.) "*Provisions and conditions*" refer to the collective bargaining agreement, and not to "*conditions* prevailing prior to the time of a work stoppage," as Howard argues.

the employer to frame his arbitration clause accordingly. An employer referring to the [citing cases] cases would perceive that if he wished to obtain judicial remedy for future violations of the no-strike clause, his arbitration clause should not be broad, should be worded as *to specifically exclude the no-strike provision from the arbitration process*, and should contain no provision for the employer to invoke arbitration at his option . . .”²⁷ (italics supplied)

Howard’s remaining complaint is that it is left without relief as to any damages it might suffer:

“This would render the Employer’s entire action meaningless if the Arbitration Panel had no right to assess damages—the crux of the Company’s remedy.”²⁸

Los Angeles Bag and Paper Company, supra, held:

“Here, Employer may properly submit the issue of damages to a trial court but the court cannot try the question of damages allegedly flowing from the stoppage until the arbitrator has first resolved the basic issue in favor of Employer.”

The order of the District Court staying the action clearly limited the submission to the arbitration board the matter of resolving the questions of whether Local Union breached Section 4 of Article I of the agreement by causing, ordering and coercing Howard’s employees to cease working, whether Local Union engaged in a strike against Howard, and whether Local Union failed to furnish employees to Howard’s projects. By clear implication, if the issue is resolved against Local Union, the matter of damages will be heard by the District Court.

²⁷ John H. Kirkwood, “The Enforcement of Collective Bargaining Contracts” 15 *Labor Law Journal* 111, February, 1964.

²⁸ Howard’s brief, last page.

The finding of the District Court that "such disputes are disputes regarding matters relating to said agreement, and as such are arbitrable matters under said agreement," is supported by the facts and law in the case, and fully supports the order of the court staying the action until arbitration has been had in accordance with the terms of the agreement.

The Order Staying Action should be sustained.

Respectfully submitted,

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Attorney for Appellees

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those rules.

Ira Schneier
Attorney for Appellee

Three copies of this Brief mailed this day of May, 1968 to:

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DON R. THOMPSON AND MILDRED THOMPSON,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONERS

Don R. Thompson
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FILED

JUL 6 1968

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IN THE UNITED STATES COURT OF APPEALS .
FOR THE NINTH CIRCUIT

No. 22,751

DON R. THOMPSON AND MILDRED THOMPSON,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE PETITIONERS

OPINION BELOW

The opinion of the Tax Court (R. 93) is reported at 49 T.C.

No. 24.

JURISDICTION

Petitioners are individuals and at all relevant times resided at 334 Calle de la Azucena, Tucson, Arizona.

This petition is filed pursuant to the provisions of Sections 7482(a), 7482(b), and 7483 of the Internal Revenue Code and involve income tax for the year 1963.

The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States.

A notice of deficiency was mailed to petitioners on December 8, 1965. On January 13, 1966, petitioners paid the amounts of the proposed deficiency plus interest thereon (in the amount of \$4,350.43 of deficiency for the year 1963 plus interest of \$456.80, and \$1,910.19 of deficiency for the year 1964 plus interest of \$85.96, a total of \$6,803.38). On February 28, 1966, within the time permitted by Section 6213 of the Internal Revenue Code, petitioners filed a petition for redetermination with the Tax Court. Issue was joined by the filing of respondent's answer on April 22, 1966. The case was tried in Phoenix, Arizona on February 13, 1967 before the Honorable C. Rogers Arundell. On December 15, 1967, the Tax Court filed its opinion directing that a decision be entered under the Tax Court's Rule 50. The opinion by Judge Arundell was not reviewed by the Tax Court. On February 5, 1968, the Tax Court entered its decision ordering and deciding that there were overpayments of federal income taxes for the years and in the amounts previously set forth but that the petitioners were not entitled to the investment credit they had claimed for 1963. The case was brought to this Court by a petition for review filed April 5, 1968, within the three month period prescribed in Section 7483 of the Internal Revenue Code of 1954. Jurisdiction is conferred on this Court by Section 7482 of that Code.

QUESTION PRESENTED

The sole question for decision is whether the petitioners are to be denied an investment credit on certain property which they purchased in 1963 solely because they had at a prior time owned the property.

STATUTES AND REGULATIONS INVOLVED

The applicable provisions of the statutes, regulations, and Congressional Committee Reports are set forth in the Appendix, infra.

STATEMENT

The basic facts in this case are not in dispute. They were stipulated or admitted in the pleadings.

On December 4, 1957, petitioners entered into a lease agreement with the owners of certain premises located in Tucson, Arizona. Shortly thereafter, petitioners commenced the conduct on these leased premises of a business known as Redwood Lodge, a restaurant. On April 2, 1962, petitioners sold the business, including all the personal property used in connection therewith, to Redwood Gay Nineties Lodge, a corporation. To secure part of the purchase price, a note and chattel mortgage were taken. (R. 22.)

The purchasers failed to make the payments on the said note and mortgage, and the mortgage was foreclosed and the property purchased by petitioners on April 4, 1963. The corporation, Redwood Gay Nineties Lodge, and its stockholders, were not related to petitioners within the meaning of either Section 267 or 707(b) of the Internal Revenue Code of 1954. (R. 22.) The property so purchased by peti-

tioners on April 4, 1963, included \$46,371.71 of tangible personal property with a useful life of seven years. (R. 23, R. 93, R. 95, Exhibit B of Joint Exhibit 3-C.)

Petitioners had a gain on the purchase of the property. This gain, amounting to \$19,593.49, consisted of the amount by which the fair market value of the property purchased exceeded the income tax basis of the note that was used to pay for the property. (Explanation A, R. 6; R. 93.)

The acquisition by petitioners on April 4, 1963 of the property referred to was a purchase of the property within the meaning of Section 179(d)(2), IRC, and the property was thereafter used by the petitioners and not by the corporation which had previously been using it. The property was, however, the property which had been owned and used by petitioners for over four years prior to their sale of the property on April 2, 1962. (R. 93-4.)

Inasmuch as the acquisition of the property qualified as a purchase within the meaning of Section 48(c)(1) [which incorporates the definition of 179(d)(2)], petitioners claimed an investment credit in connection with the acquisition of such property. Upon audit of petitioners' income tax return for 1963, this investment credit was disallowed by respondent on the basis that the property did not qualify as "used section 38 property" because of the statutory provision that "property shall not be treated as 'used section 38 property' if, after its acquisition by the taxpayer, it is used by a person who used such property before such acquisition . . ."

Before the Tax Court, petitioners contended that the statutory language regarding use of the property prior to acquisition was ambiguous and that the Court should look to the legislative purpose of the enactment. Petitioners further contended that when that legislative purpose was examined, it would be clear that Congress had in mind situations where the property was being used immediately before its acquisition by the same person who used such property immediately after its acquisition and that the quoted provision of Section 48(c)(1) was enacted "to prevent abuse."

Respondent contended that the statutory language was not ambiguous, and therefore the Court should disallow the investment credit because of the clear dictate of the statute.

At the trial, the attorney for respondent admitted, in response to a question from the presiding judge, that petitioner "should have available to him the investment credit that he would have as a purchaser, and it was not the intent of Congress to deny him the investment credit in such a circumstance as this." (Transcript 7, lines 11-23.)

The Tax Court appears to have agreed with petitioner that the language of the statute is ambiguous, for it is stated in the Opinion, "at the outset, it should be noted that our only problem here is to determine the intent of Congress in enacting the second sentence of Section 48(c)(1) . . ." (R. 98.) If the statutory language were clear and unambiguous, there would be no need to resort to a determination of the intent of Congress.

The Tax Court disagreed with petitioners' suggested rewording of the statute to reflect the Congressional intent. (R. 99.) The Court explained that, "In the first place, it (the statutory provision) only applied to property acquired by purchase after December 31, 1961. Petitioners first acquired this property in or about 1957." (Lines 1-3, R. 101.) The Court concluded that, "We express no opinion on facts different from those presented in the instant case." (R. 101.)

SPECIFICATION OF ERRORS RELIED UPON

The Tax Court erred in:

1. After impliedly concluding that the statutory language was ambiguous, and that resort should be had to the Congressional history, failing to give adequate weight to the Congressional reasoning for inserting the subject provision in Section 48(c)(1) and therefore failing to interpret the statute to carry out the Congressional purpose.
2. Failing to give any weight to the admission by respondent at trial that if the statute was ambiguous, then the intent of Congress was not to deny petitioners an investment credit in such a circumstance as this.
3. Determining, contrary to the statute, the stipulations and the positions of both parties, that a purchase within the meaning of Section 48 had not taken place in 1963.
4. Entering a decision for respondent in accordance with its erroneous interpretation of the Congressional intent, the law, and the positions of the parties in connection with the question of prior use

SUMMARY OF ARGUMENT

Section 48(c)(3), IRC, provides that the term "purchase" shall have the meaning assigned by Section 179(d)(2). The transaction whereby petitioners acquired the subject property in 1963 qualified as a purchase as that term is defined in the statute.

Since the statutory language dealing with prior use is susceptible of more than one interpretation, resort must be had to the Congressional intent in enacting the provision. An examination of the examples set forth in the committee report accompanying the bill shows that each of the situations there described had two characteristics:

1. The identity of the person using the property was the same before the change of ownership as after it; and
2. The transaction in which ownership changed was one in which there would normally be no investment credit recaptured.

Since the purpose of the provision was "to prevent abuse," it would appear that the abuse Congress had in mind was one in which no change really took place in the identity of the person using the property and in which the tax collector would not be entitled to recapture the investment credit previously taken by the "seller."

Neither condition is present in the instant case. Petitioners had not been using the property before their repossession of it, although they had used the property previously. The corporation which "sold" the property to petitioners would have been entitled to an investment credit upon its acquisition of the property, and would have been subject to an investment credit recapture as a result of the same transaction in which

petitioners claim they are entitled to an investment credit. This is in sharp contrast to the examples in the Committee Report where the sellers would not be subject to an investment credit recapture. It is obviously inequitable to allow an investment credit to a buyer when the seller has previously been allowed an investment credit on its purchase of the same property if that investment credit is not subject to recapture. Absent the recapture, the investment credit is being allowed twice on the same property, and petitioner contends that this was the "abuse" to which Congress directed its prohibition. If the investment credit of the seller is recaptured, though, then it is equitable that an investment credit be allowed the buyer.

ARGUMENT

I

THE TERM "PURCHASE" IS SPECIFICALLY DEFINED IN THE STATUTE, AND PETITIONERS' ACQUISITION IN 1963 QUALIFIED AS A PURCHASE UNDER THAT DEFINITION.

Section 48(c)(3) provides that "The term 'purchase' has the meaning assigned to such term by Section 179(d)(2)."

Section 179(d)(2) states that a purchase is any acquisition of property if certain conditions do not exist. These conditions (see Appendix) relate to the relationship between the person acquiring the property and the person from whom acquired. Such relationships do not exist in this case. In addition, a purchase would not exist if the tax basis of the property in the hands of the persons acquiring it was determined in some fashion by reference to the tax basis of the property in the hands of the person from whom acquired. Petitioners

do not derive their tax basis from the persons from whom they acquired the property. The stipulated facts make it quite clear that this transaction qualifies as a purchase within the meaning of the statute, and respondent has never contended otherwise.

Even the summary of the case prepared by the Tax Court describes the transaction involved as a purchase. Therefore, to the extent that the Tax Court held that the acquisition involved was not a purchase, such a finding was contrary to the stipulated facts, the positions of the parties, and the statute. Since such a determination is pivotal as to whether petitioner is eligible for an investment credit, it is submitted that the decision should be reversed as a result of this clearly erroneous finding.

ARGUMENT

II

THE STATUTORY LANGUAGE IS AMBIGUOUS AS TO TIME OF DISQUALIFYING USE, AND THEREFORE RESORT MUST BE HAD TO THE CONGRESSIONAL HISTORY OF THE STATUTE IN ORDER TO PROPERLY DETERMINE ITS INTENDED MEANING.

While the Court below never specifically reached a determination as to whether the statute was or was not ambiguous, its comment that "Our only problem here is to determine the intent of Congress in enacting the second sentence of Section 43(c)(1), supra" (R. 98) is a tacit admission that the statute is ambiguous. Otherwise, no resort to an attempt to determine the Congressional intent would be necessary, but respondent's contention that the literal language of the statute bars the credit claimed would have carried the day without any further

discussion. "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meaning need no discussion." Caminetti v. U. S., 242 U. S. 470, 61 L. Ed. 442, 37 Sup. Ct. 192.

The statutory language used is clearly ambiguous relative to the time of disqualifying use. The determination of whether a taxpayer is entitled to an investment credit is made at the time of acquisition, so the phrase, "if, after its acquisition by the taxpayer," must imply immediately after its acquisition," since otherwise the provision would require clairvoyant powers to administer. But if the word "immediately" is to be implied as a modifier to "after its acquisition," it seems consistent that it might be implied as a modifier to "before such acquisition" as well. Further, the article "a" in the phrase "a person who used such property before such acquisition" could mean "any one who ever used such property at any time before such acquisition," as respondent contends it unambiguously does, or it could mean "the person, or any one of the persons where more than one user is involved, who were using such property before its acquisition . . ." Petitioner contends that the language used is susceptible of either interpretation.

Petitioner therefore contends that the language of the statute is not so clear and precise, free from ambiguity, and subject to only one possible interpretation that resort to interpretation is barred, but rather contends that, as the Tax Court said, "Our . . . problem here is to determine the intent of Congress in enacting the second sentence of Section 49(c)(1), supra."

ARGUMENT
III

THE PROVISION AS TO PRIOR USE WAS ENACTED "TO PREVENT ABUSE." WHAT WAS THE ABUSE SOUGHT TO BE PREVENTED? IT WAS THE OBTAINING OF AN INVESTMENT CREDIT IN A SITUATION WHERE THE IDENTITY OF THE PERSON USING THE PROPERTY WOULD NOT BE CHANGED AND THE SELLER OF THE PROPERTY WOULD NOT BE SUBJECT TO AN INVESTMENT CREDIT RECAPTURE.

Change in User

Section 38, IRC, allows a credit which may be offset directly against income tax liability. The credit is an amount equal to seven per cent of "qualified investment" in both new equipment and in up to \$50,000 per year of used equipment. The equipment involved must have a useful life of at least four years, and the percentage of the cost of the equipment which may be counted as "qualified investment" depends upon the useful life of the equipment when acquired. Sections 46 and 48 spell out these rules.

Section 47 provides that if a taxpayer disposes of equipment on which he obtained an investment credit before having used that equipment for the useful life on the basis of which he obtained the investment credit, he must repay to the government the "unearned" portion of the investment credit. This is the "investment credit recapture" provision.

In the case of new property, the investment credit presented no opportunities for abuse by taxpayers. But used property involved a complication. A taxpayer using property could arrange a transaction whereby the property was ostensibly sold, although the same user con-

tinued to use it, and thereby create an investment credit for used property in a situation where Congress had not intended an investment credit to be allowed (i.e., in a situation where there was no actual change taking place in the identity of the person using the property).

Thus, we find in the Senate Finance Committee Report on the bill:

" . . . Used property [Section 48(c)], eligible for the credit, . . . of course, is not property which is new in use with the taxpayer. To prevent abuse, however, there has been omitted from the term 'used property,' available for the credit, that which is used by a person who used the property before such acquisition . . ." Senate Report No. 1881, 87th Congress, 2d Session, p. 15 (1962).

The specific language that Congress used to implement that intent reads, as we have noted, "Property shall not be treated as 'used section 38 property' if, after its acquisition by the taxpayer, it is used by a person who used such property before such acquisition . . ." [IRC 48(c)].

We have seen that the stated purpose of this particular language was "to prevent abuse" of the allowance of an investment credit for used equipment. What abuse? The Senate Finance Committee Report illustrated the abuse that the Committee had in mind by giving several examples (emphasis supplied):

"Thus, if property were sold under a sale and leaseback arrangement, such property in the hands of the purchaser-lessor would not be used section 38 property since the property, after its acquisition,

is being used by the same person who used it before the acquisition. Similarly, where a taxpayer has been leasing property, and subsequently purchases such property (whether or not the lease contained a purchase option feature), such property is not used section 38 property with respect to such taxpayer, since it is being used by the person who used such property before its acquisition. In addition, if property owned by a lessor is sold subject to a lease or is sold upon the termination of a lease, the property will not qualify as used section 38 property with respect to the purchaser, if thereafter the property is used by a lessee who used the property before the acquisition." Senate Report No. 1881, supra, p. 158.

All of these examples deal with situations where there is no change taking place in the person who is using the property. In the sale and leaseback, the legal title to the property is being transferred, but the former owner continues to use the property without interruption. If a lessee purchases property which he has been leasing, there is no interruption in his use of the property. If property is sold subject to a lease, the lessee continues to use the property without interruption.

What, then, is the abuse to which Congress directed this provision? From the examples given, it seems clear that Congress was concerned that an investment credit might be obtained when, in fact, there was no change in the identity of the person using the property.

Congress could have said, "Property shall not be treated as 'used section 38 property' if, after its acquisition by the taxpayer,

it is used by the person who used such property before such acquisition" In such an event, petitioners' position would be clearly correct. In fact, the Committee used this language in two of its examples. However, this would not have fully solved the problem of insuring that there was a real change taking place in the identity of the person using the property, for there are types of property that are used by more than one person. For example, a truck may be leased to X for use one day of the week and to Y for five days of the week; or a computer may be leased to X, Y and Z on a time-sharing basis. (For an example of multiple computer use, see Allis Chalmers Mfg. Co. v. U. S., (DC-Wisc. 1961) 8 AFTR 2d 5668, 200 F. Supp. 91, in which a computer was being used by six industrial and public utility corporations.) Use of "the person" instead of "a person" would not have covered the purchase of the truck by Y or of the computer by Z. That the Congress was aware of multiple user problem seems apparent (p. 158, supra) from the Committee Report comment that property could be treated as used section 38 property even though the purchaser had "also made some casual use of it before acquisition."

Relationship to Investment Credit Recapture

It is also important to note that the three examples given by the Committee (sale and leaseback, purchase of property by lessee, sale of leased property subject to the lease) all have another characteristic in common. None of these transactions results in an investment credit recapture.

Regs. 1.47-3(g) states that "Notwithstanding the provisions of Section 1.47-2, relating to disposition and cessation, paragraph (a) of

Section 1.47-1 shall not apply where Section 38 property is disposed of and as part of the same transaction is leased back to the vendor even though gain or loss is recognized to the vendor/lessee and the property ceases to be subject to depreciation in his hands." Similarly, Regs. 1.47-2(b) provides that, where a lessee has received an investment credit, the disposition of the property by the lessor shall not trigger recapture of the investment credit that was involved in connection with the property.

This we should contrast with the basic situation faced in the instant case, bearing in mind that the decision of this Court as to the meaning of this statute is going to apply to not just this taxpayer but to other taxpayers who use property, sell it in a bona fide transaction but receiving a chattel mortgage back, and ultimately have to foreclose on that chattel mortgage. As pointed out by respondent at trial (Transcript 9), the implication of the Government's position is that any prior use, other than casual use, disqualifies from the investment credit. The property may have originally been acquired on any date, sold, and then reacquired five, ten or any number of years later. Any prior use permanently "taints" the property!

Assume in the three situations below that equipment (new or used) with a thirteen year life is purchased by A for \$50,000, held for three years, and then sold to B for \$40,000. In turn, B uses the equipment for three years and it is then repurchased (repossessed or foreclosed) by A when its value is \$30,000. The three situations are:

1. The examples in the Congressional Committee Reports.

2. The rule propounded by the Tax Court.

3. The rule argued for by petitioners.

	<u>Committee Examples</u>	<u>Tax Court Rule</u>	<u>Petitioners Contention</u>
1. Investment credit when A purchases	\$ 3,500	\$ 3,500	\$ 3,500
2. Recapture when A sells to B	0	(3,500)	(3,500)
3. Investment credit to B on purchase	0	2,800	2,800
4. Recapture from B when A reacquires	0	(2,800)	(2,800)
5. Investment credit to A on repurchase	<u>0</u>	<u>0</u>	<u>2,100</u>
Net Investment Credit	<u>\$ 3,500</u>	<u>\$ 0</u>	<u>\$ 2,100</u>

Granting an investment credit in step 5 above would be a duplication in the situations covered by the Committee's examples, since there has been no recapture. Failure to grant the investment credit in step 5 under the Tax Court rule means that no net investment credit is granted to anyone. Allowing an investment credit in step 5 above, as per petitioners' contention, produces a result comparable to the Committee Report examples.

It is stated in Mertens Law of Federal Income Taxation, Vol. 1, §13.13, p. 23, "The purpose of construction is to harmonize the law and save ambiguous statutes from ineffectiveness. The legislative intent is to be drawn from the whole statute, so that a consistent interpretation may be reached and no part shall perish or be allowed to defeat another. No provision of a statute stands alone, but each must be read

with the others bearing upon it. A construction of a revenue statute conforming to the purpose of the statute and to the purpose of the Congressional enactment as an organic whole is preferred over a construction thwarting and distorting that purpose." (Citations omitted.)

The interpretation contended for by respondent appears to clearly frustrate the purpose of not only this legislation but of other tax law provisions. If the seller of property must repay the investment credit he previously took when he sells that property, but cannot obtain an investment credit if he must repurchase the property which he sold, this is bound to act as a deterrent to making sales for other than cash. This becomes difficult to impute to Congress when we consider that in Section 453, IRC, the Congress has provided for over 40 years a provision which has as its avowed purpose the encouragement of installment sales of property by allowing the sellers to report their gain on sale only as they collect the sales proceeds. When it appeared to the Congress in 1964 that taxation of sellers of real property upon repossession of such real property was imposing an undue burden on such transactions, the Congress enacted Section 1038, IRC (P. L. 88-570, September 2, 1964) to provide that such repossessions did not produce gain to the seller.

This Court itself has rejected attempts to deprive taxpayers of the benefit of the installment sale provisions as "punishment" for having failed to correctly report an installment sale transaction, commenting, "No forfeiture or penalty is assessed by law for such a mistake . . . We find the Tax Court in error in its imposition of a penalty on

taxpayer . . ." The penalty involved was refusal of the right to take advantage of Section 453. Peter Mamula v. Commissioner, 15 AFTR 2d 1269, 1272; 346 F. 2d 1016.

In spite of this, are we to infer unto Congress an intent, nowhere expressed in the statute or committee reports, to impose a penalty on those persons making installment sales of business equipment who subsequently have to repossess that equipment? Did Congress intend that sellers, faced with an investment credit recapture on the sale of equipment, should hesitate to make deferred payment sales because they would not be entitled to an investment credit (to offset in part that which had been recaptured) in the event that the property would have to be taken back?

It is hard to imagine that a Congress which was trying to encourage small business (the provision allowing an investment credit on used equipment being mainly for their benefit, as was the provision allowing the investment credit to offset tax liability 100 per cent for up to \$25,000 of tax, but only 25 per cent on tax above \$25,000) and was concerned about the poor, the underprivileged, the minority groups, having such an intent. It is these groups who would be most affected by any disinclination of sellers of business equipment to make deferred payment sales.

It certainly cannot be construed as the intent of Congress that taxpayers should be permanently deprived of any investment credit at all simply because a bona fide sale of property is succeeded by a bona fide repossession of the property sold. Yet this is exactly what

respondent would have the Court believe that Congress intended to inflict upon the small businessmen of the United States.

Example

In 1963, Taxpayer X purchases new equipment to use in his business at a cost of \$70,000, and with a useful life of 8 years. On his 1963 income tax return, he takes an investment credit of \$4,900. In 1966, he sells this equipment to Y for \$50,000. On his 1966 tax return, X must report as an addition to his tax the \$4,900 of investment credit which he took in 1963 (IRC 47).

However, when X sold the equipment to Y, he took back a chattel mortgage to secure the unpaid balance of the selling price. In 1968, X forecloses on his chattel mortgage and reacquires the equipment. The balance on the mortgage at that time is \$25,000, which is also the value of the equipment. X will be considered as having purchased the equipment at a cost to him of \$25,000. If the equipment at that time has a useful life of four years, X would be entitled to an investment credit of one-third of 7 per cent of \$25,000, or \$583, other than for respondent's interpretation of the law.

X certainly is entitled to some investment credit sometime, in all fairness and logic. He has engaged in exactly those kinds of transactions which the investment credit was designed to stimulate. He has not, in any manner, abused the investment credit. While the law provides no mechanism to restore to him the \$4,900 investment credit which he had to pay back in 1966, certainly he should not be also penalized by being deprived of the \$583 of investment credit in 1968 unless it is quite clear that Congress intended such deprivation.

Summary

The Congressional Committee Report illustrates the types of situations which were in the minds of Congress when this piece of legislation was enacted. These are situations where (1) the title to

the property changes, but the property continues to be used by the same person(s), and (2) the "disposition" of the property in the transaction involved does not normally result in a recapture of the investment credit. Allowing an investment credit under such circumstances would be a double abuse of the investment credit provision, since not only would the investment credit be twice allowed on the same equipment but also the economy would not be aided at all by such a transaction. The economy is aided by having the assets of a dormant business purchased, and the business revitalized and employment given to persons otherwise unemployed and this is exactly what happened in the instant situation.

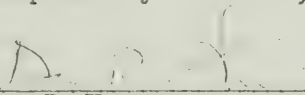
In the instant situation, Redwood Gay Nineties Lodge, a corporation, would have had an investment credit recapture in 1963 when petitioners purchased the subject property from them. Redwood Gay Nineties had been using the property for a year prior to its purchase by petitioners, and petitioners took over the property and commenced operating it only after they purchased it from Redwood Gay Nineties. Thus, there would be no double allowance of the investment credit if petitioners are allowed an investment credit.

Each example used by the Senate Committee Report is a situation where the person using the property immediately after the transaction was also using the property immediately before the transaction, and is a situation where the transaction would not normally result in investment credit recapture. Expressio unius est exclusio alterius.


CONCLUSION

For the reasons stated above, the decision of the Tax Court is erroneous and should be reversed.

Respectfully submitted,



Don R. Thompson



Mildred Thompson


Petitioners
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June ____, 1968

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

June ____, 1968



Don R. Thompson, Petitioner

APPENDIX

Internal Revenue Code of 1954:

SEC. 38. INVESTMENT IN CERTAIN DEPRECIABLE PROPERTY.

(a) **General Rule.**--There shall be allowed, as a credit against the tax imposed by this chapter, the amount determined under subpart D of this part.

(b) **Regulations.**--The Secretary or his delegate shall prescribe such regulations as may be necessary to carry out the purposes of this section and subpart B.

SEC. 47. CERTAIN DISPOSITIONS, ETC., OF SECTION 38 PROPERTY.

(a) **General Rule.**--Under regulations prescribed by the Secretary or his delegate--

(1) **Early disposition, etc.**--If during any taxable year any property is disposed of, or otherwise ceases to be section 38 property with respect to the taxpayer, before the close of the useful life which was taken into account in computing the credit under section 38, then the tax under this chapter for such taxable year shall be increased by an amount equal to the aggregate decrease in the credits allowed under section 38 for all prior taxable years which would have resulted solely from substituting, in determining qualified investment, for such useful life the period beginning with the time such property was placed in service by the taxpayer and ending with the time such property ceased to be section 38 property.

(2) **Property becomes public utility property.**--If during any taxable year any property taken into account in determining qualified investment becomes public utility property (within the meaning of section 46(c) (3) (B)), then the tax under this chapter for such taxable year shall be increased by an amount equal to the aggregate decrease in the credits allowed under section 38 for all prior taxable years which would have resulted solely from treating the property, for purposes of determining qualified investment, as public utility property (after giving due regard to the period before such change in use). If the application of this paragraph to any property is followed by the application of paragraph (1) to such property, proper adjustment shall be made in applying paragraph (1).

(3) **Carrybacks and carryovers adjusted.**--In the case of any cessation described in paragraph (1) or any change in use described in paragraph (2), the carrybacks and carryovers under section 46(b) shall be adjusted by reason of such cessation (or change in use).

(4) **Property destroyed by casualty, etc.**--No increase shall be made under paragraph (1) and no adjustment shall be made under paragraph (3) in any case in which--

(A) any property is disposed of, or otherwise ceases to be section 38 property with respect to the taxpayer, on account of its destruction or damage by fire, storm, shipwreck, or other casualty, or by reason of its theft.

(B) section 38 property is placed in service by the taxpayer to replace the property described in subparagraph (A), and

(C) the reduction in basis or cost of such section 38 property described in the first sentence of section 46(c) (1) is equal to or greater than the reduction in qualified investment which (but for this paragraph) would be made by reason of the substitution required by paragraph (1) with respect to the property described in subparagraph (A).

(b) Section Not to Apply in Certain Cases.—SUBSECTION (a) shall not apply to—

- (1) a transfer by reason of death, or
- (2) a transaction to which section 381(a) applies.

For purposes of subsection (a), property shall not be treated as ceasing to be section 38 property with respect to the taxpayer by reason of a mere change in the form of conducting the trade or business so long as the property is retained in such trade or business as section 38 property and the taxpayer retains a substantial interest in such trade or business.

(c) Special Rule.—Any increase in tax under subsection (a) shall not be treated as tax imposed by this chapter for purposes of determining the amount of any credit allowable under subpart A.

SEC. 48 (c)(1). USED SECTION 38 PROPERTY.

(1) In general.—For purposes of this subpart, the term “used section 38 property” means section 38 property acquired by purchase after December 31, 1961, which is not new section 38 property. Property shall not be treated as “used section 38 property” if, after its acquisition by the taxpayer, it is used by a person who used such property before such acquisition (or by a person who bears a relationship described in section 179(d)(2)(A) or (B) to a person who used such property before such acquisition).

SEC. 48 (c)(3). DEFINITIONS.

(A) Purchase.—The term “purchase” has the meaning assigned to such term by section 179(d)(2).

(B) Cost.—The cost of used section 38 property does not include so much of the basis of such property as is determined by reference to the adjusted basis of other property held at any time by the person acquiring such property. If property is disposed of (other than by reason of its destruction or damage by fire, storm, shipwreck, or other casualty, or its theft) and used section 38 property similar or related in service or use is acquired as a replacement therefor in a transaction to which the preceding sentence does not apply, the cost of the used section 38 property acquired shall be its basis reduced by the adjusted basis of the property replaced. The cost of used section 38 property shall not be reduced with respect to the adjusted basis of any property disposed of if, by reason of section 47, such disposition involved an increase of tax or a reduction of the unused credit carrybacks or carryovers described in section 46(b).

(C) Affiliated group.—The term “affiliated group” has the meaning assigned to such term by section 1504(a), except that—

(i) the phrase “more than 50 percent” shall be substituted for the phrase “at least 80 percent” each place it appears in section 1504(a), and

(ii) all corporations shall be treated as includible corporations (without any exclusion under section 1504(b)).

SEC. 179 (d)(2). DEFINITIONS AND SPECIAL RULES.

(2) Purchase defined.—For purposes of paragraph (1), the term "purchase" means any acquisition of property, but only if—

(A) the property is not acquired from a person whose relationship to the person acquiring it would result in the disallowance of losses under section 267 or 707(b) (but, in applying section 267(b) and (c) for purposes of this section, paragraph (4) of section 267(c) shall be treated as providing that the family of an individual shall include only his spouse, ancestors, and lineal descendants),

(B) the property is not acquired by one member of an affiliated group from another member of the same affiliated group, and

(C) the basis of the property in the hands of the person acquiring it is not determined—

(i) in whole or in part by reference to the adjusted basis of such property in the hands of the person from whom acquired, or

(ii) under section 1014(a) (relating to property acquired from a decedent).

SEC. 453. INSTALLMENT METHOD.

(a) Dealers in Personal Property.—

(1) In general.—Under regulations prescribed by the Secretary or his delegate, a person who regularly sells or otherwise disposes of personal property on the installment plan may return as income therefrom in any taxable year that proportion of the installment payments actually received in that year which the gross profit, realized or to be realized when payment is completed, bears to the total contract price.

(2) Total contract price.—For purposes of paragraph (1), the total contract price of all sales of personal property on the installment plan includes the amount of carrying charges or interest which is determined with respect to such sales and is added on the books of account of the seller to the established cash selling price of such property. This paragraph shall not apply with respect to sales of personal property under a revolving credit type plan or with respect to sales or other dispositions of property the income from which is, under subsection (b), returned on the basis and in the manner prescribed in paragraph (1).

(b) Sales of Realty and Casual Sales of Personality.—

(1) General rule.—Income from—

(A) a sale or other disposition of real property, or

(B) a casual sale or other casual disposition of personal property (other than property of a kind which would properly be included in the inventory of the taxpayer if on hand at the close of the taxable year) for a price exceeding \$1,000,

may (under regulations prescribed by the Secretary or his delegate) be returned on the basis and in the manner prescribed in subsection (a).

SEC. 1038. CERTAIN REACQUISITIONS OF REAL PROPERTY.

(a) General Rule.—If—

(1) a sale of real property gives rise to indebtedness to the seller which is secured by the real property sold, and

(2) the seller of such property reacquires such property in partial or full satisfaction of such indebtedness,

then, except as provided in subsections (b) and (d), no gain or loss shall result to the seller from such reacquisition, and no debt shall become worthless or partially worthless as a result of such reacquisition.

Treasury Regulations on Income Tax (1954 Code):

Sec. 1.47-1. RECOMPUTATION OF CREDIT ALLOWED BY SECTION 38.

- General rule.—(1) In general. (i) If during the taxable year any section 38 property the basis (or cost) of which was taken into account, under paragraph (a) of § 1.46-3, in computing the taxpayer's qualified investment is disposed of, or otherwise ceases to be section 38 property or becomes public utility property (as defined in paragraph (g) of § 1.46-3) with respect to the taxpayer, before the close of the estimated useful life (as determined under subparagraph (2)(i) of this paragraph) which was taken into account in computing such qualified investment, then the credit earned for the credit year (as defined in subdivision (ii)(a) of this subparagraph) shall be recomputed under the principles of paragraph (a) of § 1.46-1 and paragraph (a) of § 1.46-3 substituting, in lieu of the estimated useful life of the property that was taken into account originally in computing qualified investment, the actual useful life of the property as determined under subparagraph (2)(ii) of this paragraph. There shall also be recomputed under the principles of §§ 1.46-1 and 1.46-2 the credit allowed for the credit year and for any other taxable year affected by reason of the reduction in credit earned for the credit year, giving effect to such reduction in the computation of carryovers or carrybacks of unused credit. If the recomputation described in the preceding sentence results in the aggregate in a decrease (taking into account any recomputations under this paragraph in respect of prior recapture years, as defined in subdivision (ii)(b) of this subparagraph) in the credits allowed for the credit year and for any other taxable year affected by the reduction in credit earned for the credit year, then the income tax for the recapture year shall be increased by the amount of such decrease in credits allowed. For treatment of such increase in tax, see paragraph (b) of this section. For rules relating to "disposition" and "cessation", see § 1.47-2. For rules relating to certain exceptions to the application of this section, see § 1.47-3. For special rules in the case of an electing small business corporation (as defined in section 1371(b)), an estate or trust, or a partnership, see respectively, § 1.47-4, 1.47-5, or 1.47-6.
- (ii) For purposes of this section and §§ 1.47-2 through 1.47-6—

(a) The term "credit year" means the taxable year in which section 38 property was taken into account in computing a taxpayer's qualified investment.

(b) The term "recapture year" means the taxable year in which section 38 property the basis (or cost) of which was taken into account in computing a taxpayer's qualified investment is disposed of, or otherwise ceases to be section 38 property or becomes public utility property with respect to the taxpayer, before the close of the estimated useful life which was taken into account in computing such qualified investment.

(c) The term "recapture determination" means a recomputation made under this paragraph.

Sec. 1.47-2. "DISPOSITION" AND "CESSATION".

(b) Leased property—(1) In general. For purposes of paragraph (a) of § 1.47-1, generally the mere leasing of section 38 property by a lessor who took the basis of such property into account in computing his qualified investment for the credit year shall not be considered to be a disposition. However, in a case where a lease is treated as a sale for income tax purposes such transaction is considered to be a disposition. Leased section 38 property ceases to be section 38 property with respect to the lessor if, in any taxable year subsequent to the credit year, such property would not qualify as section 38 property (as defined in § 1.48-1) in the hands of the lessor, the lessee, or any sublessee. Thus, if, in a taxable year subsequent to the credit year, a lessee uses the property predominantly outside the United States, such property shall be considered to have ceased to be section 38 property with respect to the lessor.

(2) Where lessor elects to treat lessee as purchaser. For purposes of paragraph (a) of § 1.47-1, if, under § 1.48-4, the lessor of new section 38 property made a valid election to treat the lessee as having purchased such property for purposes of the credit allowed by section 38, the following rules apply in determining whether such property is disposed of, or otherwise ceases to be section 38 property with respect to the lessee:

(i) Generally, a mere disposition by the lessor of property subject to a lease shall not be considered to be a disposition by the lessee.

(ii) If the lessor makes a disposition of property subject to a lease to a person who may not, under § 1.48-4, make a valid election to treat the lessee as having purchased such property for purposes of the credit allowed by section 38 (such as a person described in paragraph (a) (5) of § 1.48-4), such property shall be considered to have ceased to be section 38 property with respect to the lessee on the date of such disposition.

(iii) If a lease is terminated and the property is transferred by the lessee to the lessor or to any other person, such transfer shall be considered to be a disposition by the lessee.

(iv) If the lessee actually purchases such property in the credit year or in a taxable year subsequent to the credit year, such purchase shall not be considered to be a disposition.

(v) The property ceases to be section 38 property with respect to the lessee if in any taxable year subsequent to the credit year such property would not qualify as section 38 property (as defined in § 1.48-1) in the hands of the lessor, the lessee, or any sublessee. Thus, for example, if, in a taxable year subsequent to the credit year, a sublessee uses the property predominantly outside the United States, the property ceases to be section 38 property with respect to the lessee.

Sec. 1.47-3. EXCEPTIONS TO THE APPLICATION OF § 1.47-1.

(g) Sale-and-leaseback transactions. Notwithstanding the provisions of § 1.47-2, relating to "disposition" and "cessation", paragraph (a) of § 1.47-1 shall not apply where section 38 property is disposed of and as part of the same transaction is leased back to the vendor even though gain or loss is recognized to the vendor-lessee and the property ceases to be subject to depreciation in his hands. If paragraph (a) of § 1.47-1 applies with respect to such property subsequent to the transaction, the actual useful life shall begin with the date on which such property was first placed in service by the vendor-lessee as owner.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FEB 24 1969

DON R. THOMPSON and MILDRED THOMPSON,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

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FILED

DEC 11 1968

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22,751

DON R. THOMPSON and MILDRED THOMPSON,

Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

STATEMENT OF THE ISSUE PRESENTED

Whether the Tax Court was correct in holding that the taxpayers are not entitled to an investment credit, under Sections 38 and 46 of the Internal Revenue Code of 1954, on the reacquisition and use of depreciable assets, which they had previously owned and used, which they had sold on April 2, 1962, and, which they had reacquired through foreclosure proceedings on April 4, 1963.

STATEMENT OF THE CASE

This appeal involves federal income taxes for the taxable year 1963 in the amount of \$2,164.01, plus interest. (I-R. 113.) The Commissioner mailed a notice of deficiency to the taxpayers on December 8, 1965. (I-R. 5.) On February 28, 1966, the taxpayers filed a petition for redetermination of the deficiency with the Tax Court. (I-R. 1-13.) The Tax Court entered its decision on February 5, 1968, sustaining the Commissioner's deficiency determination with respect to the issue on appeal, but determined overpayments as to agreed adjustments. (I-R. 109-110.) On February 19, 1968, the taxpayers filed, with the Clerk of the Tax Court, a petition for review of the Tax Court's decision by the United States Court of Appeals for the Ninth Circuit. (I-R. 111-114.) Jurisdiction is conferred on this Court by Section 7482 of the Internal Revenue Code of 1954.

The facts relevant to this petition for review, found by the Tax Court (I-R. 94-96), some of which were stipulated (I-R. 20-92), are as follows:

Taxpayers, Don R. Thompson and Mildred Thompson, are husband and wife, whose legal residence was Tucson, Arizona, at the time they filed their petition for redetermination of the deficiency with the Tax Court. They filed joint federal income tax returns for the calendar year 1963 with the District Director of Internal Revenue at Phoenix, Arizona. (I-R. 95.)

On December 4, 1957, taxpayers entered into a lease agreement with the owners of certain premises located in Tucson, Arizona, for a period of over eight years. Shortly, thereafter, taxpayers began conducting, on these premises, a business known as Redwood Lodge.

(I-R. 95.)

On April 2, 1962, taxpayers sold the business known as Redwood Lodge, including all personal property used in connection therewith, to Redwood Gay Nineties Lodge, a corporation. To secure a portion of the purchase price, a note and chattel mortgage were given to taxpayers. (I-R. 95.)

The purchasers failed to make payments on the note, and on April 4, 1963, just one year after the sale, the mortgage was foreclosed. (I-R. 95.)

Neither the Redwood Gay Nineties Lodge Corporation nor its shareholders were related to taxpayers within the meaning of either Section 267 or 707(b) of the Internal Revenue Code of 1954. (I-R. 95.)

As a result of the foreclosure by taxpayers, they reacquired \$46,371.71 of tangible personal property with a useful life of seven years. This property was the very same personal property which they had owned and used in connection with their business prior to the aforementioned sale of April 2, 1962. (I-R. 95-96.) All of the reacquired property was also originally purchased by taxpayers prior to January 1, 1962, the date on which the investment credit became effective. (I-R. 101.)

Taxpayers began using the reacquired property again in 1963 (I-R. 95), and they claimed an investment credit in connection with the reacquisition of such property on their 1963 tax return (I-R. 24-37).

The Commissioner, in his deficiency notice of December 8, 1965, determined that none of the assets acquired in connection with the repossession of the Redwood Lodge qualified for an investment credit under Section 38, et seq., of the Internal Revenue Code. (I-R. 8.)

The Tax Court sustained the Commissioner's position. (I-R. 101.)

SUMMARY OF ARGUMENT

The Tax Court's holding that taxpayers are not entitled to an investment credit in the present situation, based on the plain and unambiguous language of Section 48(c)(1) of the Internal Revenue Code, is correct. This section of the Code expressly denies the investment credit to a taxpayer who acquires property and then permits it to be used by a person who used the property before taxpayer acquired it. Taxpayers in the present situation used the \$46,371.71 of assets before the 1963 acquisition through foreclosure, from 1957 to 1962. They were also the ones using the property after the acquisition in 1963. They thus come fully within the exclusionary language of Section 48(c)(1).

Contrary to taxpayers' arguments, the legislative history and the Regulations promulgated under Section 48(c)(1) do not conflict with the Commissioner's position. The Regulations merely repeat the language of the statute. The legislative history indicates that Section 48(c)(1) was enacted "to prevent abuse" of the investment

credit. The present situation would, in fact, result in an abuse of the investment credit in several ways if taxpayers' contentions are upheld. For example, the credit, which was enacted to encourage investment in newly acquired assets after 1961, could be availed of by taxpayers, who invested no additional funds in the property after 1957. The Tax Court's opinion should therefore be affirmed.

ARGUMENT

THE TAX COURT CORRECTLY HELD THAT TAXPAYERS
ARE NOT ENTITLED TO AN INVESTMENT CREDIT ON
THE REACQUISITION AND USE OF ASSETS, PREVIOUSLY
ACQUIRED BY THEM IN 1957 AND SOLD IN 1962,
AND REACQUIRED THROUGH FORECLOSURE PROCEEDINGS
IN 1963

A. Under the clear and unambiguous language of
the statute, the reacquired property does not
qualify for an investment credit

The sole issue presented for review is whether the \$46,371.71 of personal property reacquired by the taxpayers in 1963 qualifies for an investment credit. (I-R. 112.) In 1962, "to encourage modernization and expansion of the Nation's productive facilities and thereby improve the economic potential of the country," Sections 38 and 46 through 48, all Appendix, infra, granting an investment credit for certain depreciable property acquired or constructed by a taxpayer, were added to the Internal Revenue Code of 1954 by Section 2 of the Revenue Act of 1962, P.L. 87-834, 76 Stat. 960. S. Rep. No. 1881, 87th Cong., 2d Sess., p. 11 (1962-3 Cum. Bull. 707, 717). To qualify for the credit (which is applied against the tax liability itself, thereby directly reducing such liability), the property must have a useful life of four years or more, and it must be personal property. Section 48(a).

Although the investment credit is primarily designed to encourage investment in new production facilities, a limited credit is available for used depreciable property which is newly acquired during the taxable year. However, no more than \$50,000 of such property may qualify for the credit in any taxable year. Section 48(c)(1) and (2). Such a limited credit was considered necessary "because of the greater dependence of small business on used property" as a means of expanding productive facilities. H. Rep. No. 1447, 87th Cong., 2d Sess., p. 9 (1962-3 Cum. Bull. 405, 413.)

Section 48(c)(1) defines the term "used section 38 property" for the purposes of the investment credit. It specifically and unambiguously provides that, for purposes of the investment credit, "Property shall not be treated as 'used section 38 property' if, after its acquisition by the taxpayer, it is used by a person who used such property before such acquisition * * *."

The property which taxpayers seek to qualify for the investment credit is clearly ineligible for such treatment under the narrow statutory definition of "used section 38 property." The property here was purchased in 1957 and used steadily by the taxpayers until 1962, when they sold it. They reacquired the property in 1963 and began using it again. Thus, the property in issue was being used by a person who used it before the acquisition, within the very language of Section 48(c)(1).

Taxpayers contend (Br. 10), however, that the relevant portion of the statute, quoted above, is ambiguous, and that it should be interpreted as if Congress had inserted the word "immediately" twice in the sentence, thus making it read as follows:

Property shall not be treated as "used section 38 property" if, immediately after its acquisition by the taxpayer, it is used by a person who used such property immediately before such acquisition * * *.
(Underlined words added by taxpayers.)

Taxpayers would then argue that since they did not use the reacquired property "immediately" before they acquired it by way of the foreclosure (i.e., they used it up to one year before the reacquisition), the statutory restriction would not apply to them.

Taxpayers' novel attempt to encourage this Court to invade the legislative province of Congress and alter the plain and direct language of a statute is unfounded as both a legal and historical proposition. See, e.g., 1 Mertens, Law of Federal Income Taxation (Rev. ed.), Sec. 3.02, p. 4, fn. 14: "meaning may not be interpolated where the statutory language is unequivocal and where liberal interpretation leads to no absurdity 'so gross as to shock the general moral or common sense,' see Girard Inv. Co. v. Comm., 122 F 2d 843 (CCA 3rd, 1941)." Also see opinion of Justice Brandeis in Iselin v. United States, 270 U.S. 245 (1926). Taxpayers point to no ambiguity in the second portion of the above-quoted sentence. Instead, they merely claim that "if the word 'immediately' is to be implied as a modifier to 'after its acquisition,' it seems consistent that it might be implied as a modifier to 'before such acquisition as well'." (Br. 10.)

We see no reason, based in law or logic, for concluding that any portion of the statute implies the word "immediately." If Congress had intended to convey the idea of immediacy, it would have done so by including the word "immediately" in the statute itself, as it has done on many previous occasions. See, e.g., Section 351(a) of the Internal Revenue Code of 1954, "immediately after;" Section 355(a)(1)(A)(ii) of the Internal Revenue Code of 1954, "immediately before." There is no reason why it should have acted differently in connection with Section 48(c)(1).

Contrary to taxpayers' contentions, there is nothing in the Regulations which conflicts with the Commissioner's position here. As the Tax Court noted (I-R. 100):

It [Treasury Regulations, Section 1.48-3] repeats the exact words of the statute with perhaps the qualification that property shall not be considered as used by a person before its acquisition if such property was used only on a 'casual' basis by such person. The latter qualification could hardly apply to petitioners for they used the property reacquired on April 4, 1963, from about December 4, 1957, to April 2, 1962, which would be more than a casual use.

Although an inquiry into the legislative history of the investment credit will lend further support to the Commissioner's position, this Court needs to go no further than the clear and definite wording of Section 48(c)(1) to affirm the decision of the Tax Court.

- B. The spirit of the statute, which is manifested in its legislative history and in the Regulations promulgated thereunder, supports a denial of the investment credit in the present situation

The following reason was given by the House Ways and Means Committee for including the sentence in question here as part of the Section 48(c)(1) definition of used property (H. Rep. No. 1447, supra, p. 10 (1962-3 Cum. Bull. 405, 414)):

To prevent abuse, however, there has been omitted from the term "used property," available for the credit that which is used by a person who used the property before such acquisition * * *.

The Committee Report then goes on to cite three examples where such an "abuse" might have existed, were it not for the narrow definition of used property which this sentence provides, and these examples are repeated in the Treasury Regulations on Income Tax, Section 1.48-3, Appendix, infra.

It may be that these three examples all involve situations where the person using the property after the acquisition happens to be the same person who used it immediately before the acquisition. Nevertheless, these examples do not, by any means, intend to illustrate the necessity for immediacy, but instead, show that the credit is not available where an asset acquisition does not result in the expansion or modernization of the user's productive facilities. Since the investment credit was enacted to promote economic growth (S. Rep. No. 1881, supra, p. 11 (1962-3 Cum. Bull. 707, 717)), it should not be available when an asset acquisition does not result in the economic growth and expansion of the user's productive facilities.

The sale and leaseback, the purchase by a lessee of the leased property, and the purchase by a lessor of property subject to a continuing lease (which are the three examples cited in the Committee Reports and in the Regulations) result in no actual economic growth, in no additional commitment by a producer to newly acquired assets. The investment credit is therefore not available in these situations.

If the rationale behind the Regulations is applied to the present situation, it becomes even clearer that the investment credit should not be permitted. Taxpayers committed funds for the purchase of the property in 1957 and used it in their business for five years. If the investment credit had been in effect at that time, it would have been available to them, since they had taken an action which the credit is designed to encourage; they had committed funds for the purchase of capital assets, thereby expanding their productive facilities. In 1963, however, when taxpayers reacquired the property to which \$46,371.71 of their funds had remained committed over the years, they engaged in no activity which could be labeled an expansion or modernization of productive facilities. Having committed no new funds or additional credit to the acquisition of the assets in 1963, taxpayers should be denied use of the investment credit to prevent abuse.

The facts in this case reveal still another abuse involved in permitting the taxpayers an investment credit on the reacquired property. They committed funds to the property in 1957, when no investment credit was available. From 1957 through 1963, these same funds remained committed to this same property. The investment credit was enacted in 1962 and was to apply to "used property which is newly acquired" after December 31, 1961. H. Rep. No. 1447, supra, p. 9 (1962-3 Cum. Bull. 405, 413). The sale and subsequent foreclosure by taxpayers should not enable them to claim a credit which was designed to encourage additional investment after December 31, 1961. Thus, the purpose of the statute as well as its clear language would be subverted if taxpayers were permitted an investment credit in the present case.

Taxpayers' argument based on the recapture Regulations (Br. 14-15) is not only a distortion of the legislative history of the statute, but is also the result of an inaccurate reading of those Regulations. Taxpayers contend that in each example provided by Treasury Regulations, Section 1.48-3(a), to illustrate the "abuse" which Section 48(c)(1) is designed to avoid, the investment credit is denied to the new owner because under Treasury Regulations, Sections 1.47-2(b)(2) and 1.47-3(g), both Appendix, infra, these precise fact situations present instances where there is no investment credit recapture by the Government from the original owner or user prior to the change of ownership. (i.e., the change of ownership is not considered a "disposition" or "cessation" of one's interest in Section 38 property.) According to the taxpayers, then, Section 48(c)(1) was enacted to prevent the possibility of two investment credits on the same property at the same time, by denying the credit to the purchaser.

To begin with, it should be noted that taxpayers are incorrect in their basic premise that the three examples in Section 1.48-3(a) of the Regulations each involve a situation where there is no recapture of the investment credit when the change in ownership occurs. In fact, one of the cases, that of the sale by a lessor who has not elected under Section 48(d) to treat his lessee as the investor to a purchaser who continues leasing to the same lessee, will result in a recapture of the investment credit by the lessor (according to Treasury Regulations, Section 1.47-2(b)(2), only if the election had been made, would there be no recapture), and a denial of the credit to the purchaser under Section 48(c)(1), because the property is being used by the same person before and after the sale. It follows that Section 48(c)(1) cannot be called a mere remedy for the recapture abuse.

As a historical proposition, taxpayers' recapture argument is especially deficient. They contend that Section 48(c)(1), which was enacted in 1962, was designed to correct a possible abuse created by Treasury Regulations, Section 1.47-2(b)(2) and Section 1.47-3(g), both of which were promulgated in 1967. It is immediately apparent that a prior statute could not have been intended to correct a subsequent Regulation.

Finally, taxpayers' assertion that the Commissioner's position is a deterrent to deferred payment sales is correct only to the extent that the investment credit recapture provisions act as a deterrent to all sales of Section 38 property before the expiration of their useful lives. Taxpayers, thus, rather inadvertently bring out the thrust of the Commissioner's position: the investment credit is meant to apply

to investment situations and not sale transactions. When a taxpayer invests in a depreciable asset and begins using it, he can claim an investment credit for that asset. Once having had the opportunity to take a credit for the investment in that asset, however, he may not sell it and buy it back and claim a second investment credit for the same asset. The second purchase is not considered an investment in "used section 38 property" under the plain and unambiguous language of Section 48(c)(1). */

CONCLUSION

For the above reasons, the Tax Court's decision should be affirmed.

Respectfully submitted,

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DECEMBER, 1968.

*/ Taxpayers claim (Br. 5.) that at trial, the Commissioner's attorney admitted that they should have the investment credit available to them. No such admission was ever made, as a reading of the transcript will reveal, and the Tax Court's failure to find or even mention the existence of such an admission should be affirmed. When read in context, the sentence excised by taxpayers from the Transcript of the Tax Court proceedings indicates only that the Commissioner was willing to treat the repossession as a purchase for purposes of the investment credit, since he was treating it as a purchase for purposes of computing gain, and that it was not the intent of Congress to deny an investment credit in a repossession merely because it is technically not a purchase. (II-R. 7.)

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on petitioners appearing pro se by mailing four copies on this _____ day of December, 1968, in an air mail envelope, with postage prepaid, properly addressed to them as follows:

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APPENDIX

Internal Revenue Code of 1954:

SEC. 38 [as added by Sec. 2, Revenue Act of 1962, P.L. 87-834, 76 Stat. 960]. INVESTMENT IN CERTAIN DEPRECIABLE PROPERTY.

(a) General Rule.--There shall be allowed, as a credit against the tax imposed by this chapter, the amount determined under subpart B of this part.

* * *

(26 U.S.C. 1964 ed., Sec. 38.)

SEC. 46 [as added by Sec. 2, Revenue Act of 1962, supra].
AMOUNT OF CREDIT.

(a) Determination of Amount.--

(1) General rule.--The amount of the credit allowed by section 38 for the taxable year shall be equal to 7 percent of the qualified investment (as defined in subsection (c)).

* * *

(c) Qualified Investment.--

(1) In general.--For purposes of this subpart, the term "qualified investment" means, with respect to any taxable year, the aggregate of--

(A) the applicable percentage of the basis of each new section 38 property * * * plus

(B) the applicable percentage of the cost of each used section 38 property (as defined in section 48(c)(1)) placed in service by the taxpayer during such taxable year.

(2) Applicable percentage.--For purposes of paragraph (1), the applicable percentage for any property shall be determined under the following table:

<u>If the useful life is--</u>	<u>The applicable percentage is--</u>
--------------------------------	---------------------------------------

4 years or more but less than 6 years....	33 1/3
6 years or more but less than 8 years....	66 2/3
8 years or more.....	100

* * *

(26 U.S.C. 1964 ed., Sec. 46.)

SEC. 47 [as added by Sec. 2, Revenue Act of 1962, supra].
CERTAIN DISPOSITIONS, ETC., OF SECTION 38 PROPERTY.

(a) General Rule.--Under regulations prescribed by the Secretary or his delegate--

(1) Early disposition, etc.--If during any taxable year any property is disposed of, or otherwise ceases to be section 38 property with respect to the taxpayer, before the close of the useful life which was taken into account in computing the credit under section 38, then the tax under this chapter for such taxable year shall be increased by an amount equal to the aggregate decrease in the credits allowed under section 38 for all prior taxable years which would have resulted solely from substituting, in determining qualified investment, for such useful life the period beginning with the time such property was placed in service by the taxpayer and ending with the time such property ceased to be section 38 property.

*

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*

(26 U.S.C. 1964 ed., Sec. 47.)

SEC. 48 [as added by Sec. 2, Revenue Act of 1962, supra].
DEFINITIONS; SPECIAL RULES.

*

*

*

(c) Used Section 38 Property.--

(1) In general.--For purposes of this subpart, the term "used section 38 property" means section 38 property acquired by purchase after December 31, 1961, which is not new section 38 property. Property shall not be treated as "used section 38 property" if, after its acquisition by the taxpayer, it is used by a person who used such property before such acquisition (or by a person who bears a relationship described in section 179(d)(2)(A) and (B) to a person who used such property before such acquisition).

(a) Dollar limitation.--

(A) In general.--The cost of used section 38 property taken into account under section 46(c)(1)(B) for any taxable year shall not exceed \$50,000. * * *

*

*

*

(26 U.S.C. 1964 ed., Sec. 48.)

Treasury Regulations on Income Tax (1954 Code):

§ 1.47-2 "Disposition" and "cessation".

*

*

*

(b) Leased property--(1) In general. * * *

(2) Where lessor elects to treat lessee as purchaser.

For purposes of paragraph (a) of § 1.47-1, if, under § 1.48-4, the lessor of new section 38 property made a valid election to treat the lessee as having purchased such property for purposes of the credit allowed by section 38, the following rules apply in determining whether such property is disposed of, or otherwise ceases to be section 38 property with respect to the lessee:

(i) Generally, a mere disposition by the lessor of property subject to a lease shall not be considered to be a disposition by the lessee.

*

*

*

(iii) If a lease is terminated and the property is transferred by the lessee to the lessor or to any other person, such transfer shall be considered to be a disposition by the lessee.

(iv) If the lessee actually purchases such property in the credit year or in a taxable year subsequent to the credit year, such purchase shall not be considered to be a disposition.

*

*

*

(26 C.F.R., Sec. 1.47-2.)

§ 1.47-3 Exceptions to the application of §1.47-1.

*

*

*

(g) Sale-and-leaseback transactions. Notwithstanding the provisions of §1.47-2, relating to "disposition" and "cessation", paragraph (a) of §1.47-1 shall not apply where section 38 property is disposed of and as part of the same transaction is leased back to the vendor even though gain or loss is recognized to the vendor-lessee and the property ceases to be subject to depreciation in his hands. * * *

(26 C.F.R., Sec. 1.47-3.)

\$1.48-3 Used section 38 property.

(a) In general. (1) Section 48(c) provides that "used section 38 property" means section 38 property acquired by purchase after December 31, 1961, which is not "new section 38 property". * * *

(2)(i) Property shall not qualify as used section 38 property if, after its acquisition by the taxpayers, it is used by (a) a person who used such property before such acquisition, * * * Thus, for example, if property is used by a person and is later sold by him under a sale and lease-back arrangement, such property in the hands of the purchaser-lessor is not used section 38 property because the property, after its acquisition, is being used by the same person who used it before its acquisition. Similarly, where a lessee has been leasing property and subsequently purchases it (whether or not the lease contains an option to purchase), such property is not used section 38 property with respect to the purchaser because the property is being used by the same person who used it before its acquisition. In addition, if property owned by a lessor is sold subject to the lease, or is sold upon the termination of the lease, the property will not qualify as used section 38 property with respect to the purchaser if, after the purchase, the property is used by a person who used the property as a lessee before the purchase.

(ii) For purposes of applying subdivision (i) of this subparagraph * * * property shall not be considered as used by a person before its acquisition if such property was used only on a casual basis by such person.

*

*

*

(26 C.F.R., Sec. 1.48-3.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CECIL R. REED,

Appellant

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIEF FOR THE APPELLEES

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 22754

CECIL R. REED,

Appellant

v.

STEWART L. UDALL, SECRETARY OF THE INTERIOR, ET AL.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

BRIEF FOR THE APPELLEES

OPINION BELOW

The opinion of the district court (Honorable Bruce R. Thompson) appears at pages 122-126 of the record. Its findings of facts and conclusions of law appear at R. 144-147.

JURISDICTION

Judgment was entered on December 19, 1967 (R. 147). Notice of appeal was filed on February 16, 1968 (R. 148). The jurisdiction of this Court rests on 28 U.S.C. sec. 1291.

ISSUE PRESENTED

1. Whether there is substantial evidence supporting the decision of the Secretary of the Interior cancelling appellant's homestead entry because it did not meet the cultivation requirements of 43 U.S.C. sec. 164.

STATUTES AND REGULATIONS INVOLVED

The Act of June 6, 1912, 37 Stat. 123, 43 U.S.C. sec. 164, provides in pertinent part:

No certificate shall be given or patent issued therefor until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead his widow, or in case of her death his heirs or devisee, or in case of a widow making such entry her heirs or devisee, in case of her death, proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit and makes affidavit that no part of such land has been alienated, except as provided in section 174 of this title, and that he, she, or they will bear true allegiance to the Government of the United States, then in such case he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law: * * * Provided further, That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry and until final proof, except that in the case of entries under section 218(f) of this title, double the area of cultivation herein provided shall be required, but the Secretary of the Interior may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation: * * *.

The Act of September 27, 1944, 58 Stat. 747, as amended, 43 U.S.C. sec. 279, provides in pertinent part:

Any person who has served in the military or naval forces of the United States for a period of at least ninety days at any time on or after September 16, 1940, and prior to the termination of the Korean conflict as determined by Presidential proclamation or concurrent resolution of the Congress, and is honorably discharged from the military or naval forces and who makes homestead entry subsequent to such discharge shall have the period of such service, not exceeding two years, construed to be equivalent to residence and cultivation upon the land for the same length of time. * * * No patent shall issue to any such person who has not resided upon his homestead and otherwise complied with the provisions of the homestead laws for a period of at least one year: Provided, That such compliance shall include bona fide cultivation of at least one-eighth of the area entered under the homestead laws: * * *.

STATEMENT

This is an appeal from an order of the district court upholding the decision of the Secretary of the Interior cancelling appellant's homestead entry. The relevant facts may be summarized as follows:

On April 15, 1955, Cecil R. Reed filed an application (Nevada 034275) under the homestead laws, to enter a 160-acre tract of public land in Douglas County, Nevada (R. 145). On April 29, 1957, Reed's entry was allowed after the lands had been classified as available for homestead entry under 43 C.F.R. sec. 296.4 (1954 ed.) (R. 145).

On May 11, 1961, Reed filed an application for a patent to the lands included in his entry, stating that he had completed two years of military service, which should be credited to the cultivation time requirements under the Act of September 27, 1944, 58 Stat. 747, as amended, 43 U.S.C. sec. 279. On April 18, 1962, the Department of the Interior, pursuant to the provisions of 43 C.F.R. sec. 1852.2 (formerly 43 C.F.R. sec. 221.67), initiated a contest proceeding, charging that Reed had failed to comply with the cultivation requirements of the homestead laws (R. 145). A hearing was held before a hearing examiner pursuant to the provisions of 43 C.F.R. secs. 1852.1 7(b), 1852.2 2 and 1852.3 (R. 146). The hearing examiner dismissed the contest proceeding (R. 146). The examiner construed the Act of September 27, 1944, 58 Stat. 747, as amended, 43 U.S.C. sec. 279, as authorizing the cultivation of only one-sixteenth of the area entered and ruled that the cultivation of 10 acres in 1959 was sufficient for compliance. The hearing examiner reasoned that (R. 146):

"* * * since the entryman is entitled to two years of military credit he is only required to cultivate one-sixteenth of the 160 acres for any one of the three years (1958, 1959, 1960) * * *. There is no regulation nor decision of the Department requiring that credit for military service be applied to any particular year during the statutory life of the entry * * *."

The hearing examiner also held that there was no necessity for the entryman (Reed) to show that he had developed a water supply adequate for the 160 acres, stating that cultivation of one-sixteenth of the 160 acres in 1959 met this requirement of the homestead law (R. 146).

The decision of the hearing examiner was appealed to the Director of the Bureau of Land Management who, on July 7, 1964, reversed the decision of the hearing examiner (R. 146-147). The Director held that an entryman was required to cultivate one-eighth of the area of entry as required by 43 U.S.C. sec. 164, as qualified by the Act of September 27, 1944, 58 Stat. 747, as amended, 43 U.S.C. sec. 279, and that the entryman did not cultivate the required amount (R. 147). The area director also held that the entryman failed to establish adequate irrigation facilities in a situation where any attempt to grow crops without the benefit of irrigation was impossible, indicating that the entry was not made or maintained in good faith (R. 147). The decision of the Director was affirmed by the Secretary^{1/} on September 29, 1965 (R. 147). The Secretary fully analyzed the evidence before him (Admin. Rec., R. 95-100, 103-107). The Secretary noted that since the only year "in which the entryman purported to cultivate 20 acres was his fourth [April 1960-April 1961], if he did not cultivate 20 acres in that year, his

^{1/} We use the term "Secretary" in this brief, although the decision was by a subordinate acting under delegated authority. 24 Fed. Reg. 1348.

final proof must be rejected and his entry cancelled" (Admin. Rec., R. 97). The Secretary then held (Admin. Rec., R. 98):

The appellant's allegation that he cultivated and planted 20 acres of oats cannot be accepted as substantiated. The land examiner, testifying on behalf of the United States, stated that when he visited the land on January 5, 1962, he found "approximately twenty acres of partially cleared land" (Tr. 29, 38), that all the native vegetation had not been removed, and that "sagebrush was still left standing in the fields, which would interfere with a proper tillage or cultivation of the fields" (Tr. 38). He stated that he saw no evidence of tillage for a crop other than native grasses (Tr. 39), and that no stubble of any oat crop at all was on the land (Tr. 40). If an oat crop had been grown or raised, stubble would have remained (Tr. 40).

The Secretary also noted that for "cultivation to satisfy the requirements of the homestead laws it must be bona fide and not a mere pretense" and that cultivation without artificial irrigation when artificial irrigation is necessary for production of crops "cannot be considered to be bona fide since it cannot be calculated to produce a profitable result" (Admin. Rec., R. 103, 104). In the present case (Admin. Rec. R. 103, 105-106):

The land examiner for the United States testified that the land involved is "desert in character, lacking nutrients, and requiring water for the growth of crops" (Tr. 31). "The climate is arid in nature" (Tr. 31) and artificial irrigation is indispensable to cultivate the land in the entry and produce a profitable crop (Tr. 32).

There was no testimony at the hearing that irrigation was not required for the successful raising of a crop in 1961. Appellant admitted that the oats assertedly planted that year did not mature (Tr. 101). Although he stated that the land in his entry did "not necessarily" require the application of water in order to produce a crop, he said it would produce a crop better with the application of water (Tr. 104), that it was possible that the reason he got such an insignificant crop was due to lack of water and that he "would have gotten a beautiful crop" if he had irrigated the 20 acres (Tr. 106). This testimony plainly shows that appellant did not take steps reasonably calculated to produce a successful crop in that he omitted perhaps the most essential step, the application of water. He relied wholly on the natural rainfall (Tr. 106) which is simply not adequate for successful crop production in the area.

The Secretary concluded (Admin. Rec., R. 106):

Thus, it can be seen that the appellant's purported cultivation here was neither sufficient quantity-wise nor a bona fide effort.

On November 29, 1965, Reed filed a complaint in the United States District Court for the District of Nevada seeking review of the Secretary's decision under the Administrative Procedure Act, 5 U.S.C. sec. 701 and the mandamus statute, 28 U.S.C. sec. 1361. At the trial, after argument by the parties, the case was submitted on the administrative record (R. 122). On July 6, 1967, the court entered an order entitled "Order Granting Summary Judgment" (R. 122), analyzing the Secretary's decision and concluded (R. 126):

Our review of the entire record and consideration of it as a whole has persuaded us that in this case, the Secretary has shown ample reason to discount the weight of the evidence produced by this plaintiff and has properly held that he has failed to sustain the burden of proof.

On July 17, 1967, Reed moved for a new trial (R. 127). On December 19, 1967, the court denied Reed's motion, noting, however, that it had incorrectly entitled its order of July 6, 1967, as an "Order Granting Summary Judgment," since no such motion had been made (R. 144), but rather the parties had agreed to submit the case on the administrative record (R. 145). The court corrected its technical error (R. 145) and filed findings of fact and conclusions of law supplementing its previous order (R. 144). The court concluded that the Secretary's decision (R. 147):

* * * is not arbitrary, is not unreasonable, is supported by the evidence, is in accordance with law, and was rendered without infringement of the requirements of due process of law.

Judgment was entered on December 19, 1967 (R. 147). This appeal followed (R. 148).

ARGUMENT

THERE IS SUBSTANTIAL EVIDENCE
SUPPORTING THE SECRETARY'S DECISION
CANCELLING REED'S HOMESTEAD ENTRY

A. The only issues on review are whether the Secretary's decision is based on substantial evidence and his interpretation of statutes administered by him is reasonable. - We note, at

outset, that it is apparent from appellant's briefs, both in this Court and in the court below, that appellant misconstrues the scope of review of administrative decisions under the tests laid down by the courts.^{2/} Judicial review of a final administrative decision of the Secretary of the Interior is limited to an examination of the record before the agency. Adams v. United States, 318 F.2d 861, 867 (C.A. 9, 1963); Dredge Corporation v. Penny, 338 F.2d 456, 463 (C.A. 9, 1964). The Secretary of the Interior is charged with administration of statutes relating to the public domain, and his interpretation of statutes and regulations relating to the public domain may not be set aside unless such interpretations are fraudulent or devoid of reason. Udall v. Tallman, 380 U.S. 1, 16-18 (1965). If there is substantial evidence in the record to support the Secretary's

2/ Since the district court clearly had jurisdiction to review this administrative decision of the Secretary of the Interior under 28 U.S.C. sec. 1361, it is unnecessary to decide whether the court also had jurisdiction under some other statute. The Secretary has taken the position before this Court that the Administrative Procedure Act, 5 U.S.C. sec. 701, is not jurisdictional, and we do not wish to be understood as taking any inconsistent position in this case. However, since our views are fully stated to the Court in United States, et al. v. Walker, No. 22379, and State of Washington v. Udall, No. 22413, now awaiting oral argument, we will not elaborate this issue in this brief. Under any standard of review, the Court will affirm the decision of the Secretary if it is supported by substantial evidence and there is otherwise no error of law. E. J. Palmer, et al. v. The Dredge Corporation, _____ F.2d _____ (C.A. 9, decided June 26, 1968).

decision on factual matters, whether or not there is substantial evidence to support an opposite view, the Secretary's decision may not be set aside. Foster v. Seaton, 271 F.2d 836, 838-839 (C.A. D.C. 1959); E. J. Palmer v. The Dredge Corporation, _____ F.2d _____ (C.A. 9, decided June 26, 1968); Henrikson v. Udall, 350 F.2d 949, 950 (C.A. 9, 1965); Adams v. v. United States, 318 F.2d 861, 873 (C.A. 9, 1963); Standard Oil Co. of California v. United States, 107 F.2d 402, 414 (C.A. 9, 1940). In many matters before the Secretary, there is an initial decision by a hearing examiner as in the present case. The Secretary will consider the conclusions of the hearing examiner and other subordinate officials, but the ultimate decision is the Secretary's and it is his decision, based upon his review of the record, which is final and appealable. Henrikson v. Udall, 229 F.Supp. 510, 512 (N.D. Cal. 1964), aff' 350 F.2d 949 (C.A. 9, 1965). See Sisto v. Civil Aeronautics Board, 179 F.2d 47, 51 (C.A. D.C. 1949).

B. There is substantial evidence to support the Secretary's decision. - Turning now to the Secretary's decision in view of the evidence before the Secretary, supra, p. 5 (Admin. Rec., R. 95-100), it is readily apparent that there is substantial evidence to support the decision that Reed had not cultivated 20 acres as required by statute in the fourth crop year. When the testimony of the land examiner is that he found

approximately 20 acres of "partially cleared land" (Tr. 29, 38), that all the native vegetation had not been removed, and that "sagebrush was still left standing in the fields, which would interfere with the proper tillage or cultivation" (Tr. 38), that there was no evidence of tillage for a crop other than native grasses (Tr. 39) and that no stubble of any oat crop at all was on the land (Tr. 40), it is easy to understand why Reed does not argue that there is no substantial evidence to support the Secretary's findings. Nicholas v. Secretary of Department of Interior, 385 F.2d 177 (C.A. 9, 1967). In view of the fact that there is substantial evidence to support the Secretary's decision, it is immaterial that, granting full credibility to the entryman's evidence, there might also be evidence supporting another conclusion. Foster v. Seaton, 271 F.2d 836, 838 (C.A. D.C. 1959).

C. The Secretary's interpretation of 43 U.S.C. sec. 164 as not preventing the institution of a contest proceeding is reasonable. - Reed contends (Br. 12) that the Secretary and the district court did not comply with the standards of proof stated in 43 U.S.C. sec. 164. It is Reed's contention that, since he submitted the testimony of "two disinterested witnesses" and himself when he submitted his final proof, he is entitled to patent under the statute. Reed's argument thus

amounts to a contention that the Secretary must accept, without question, the final proof of an entryman which is credible on its face.^{3/} The Secretary obviously interpreted 43 U.S.C. sec. 164 as allowing him to initiate a contest proceeding in which to challenge the veracity of the final proof. This is a reasonable interpretation which, under the authorities cited in Point "A" above, should be affirmed. The authority of the Secretary as guardian of the public interest to see that laws regulating the acquisition of rights in public lands are rightly exercised, has been reiterated many times by the Supreme Court. Best v. Humboldt Mining Co., 371 U.S. 334, 336-338 (1963); Boes Udall, 373 U.S. 472, 476-477 (1963); Cameron v. United States, 252 U.S. 450, 459-460 (1920). The Supreme Court has held that, under the pre-emption laws, the Secretary may look into the basis of an entryman's final proof, even after it has been accepted by the local land office and the price of the land paid. Orchard v. Alexander, 157 U.S. 372 (1895). As the district court here pointed out " * * * the Government does not supervise or oversee the activities of the homesteader in proving up his entry" (R. 126). There is no opportunity to investigate the validity of the facts asserted in the final proof until after

^{3/} There is nothing in the record to indicate that Reed made this contention either to the district court or in the administrative proceedings. Thus, he is not entitled to raise it for the first time on appeal. United States v. Tucker Truck Lines, 344 U.S. 33, 36-37 (1952).

it has been made. Were the Secretary precluded from having the government officers investigate after filing of the final proof, the public domain would be greatly diminished by all sorts of fraudulent claims. The Secretary's interpretation of 43 U.S.C. sec. 164 as not precluding a contest proceeding is therefore entirely reasonable and should be upheld by this Court. Udall v. Tallman, 380 U.S. 1, 16 (1965).

Reed argues that his attempts at cultivation were made in "good faith" (Br. 8) and, therefore, the Secretary should not have cancelled his entry. The Secretary's opinion on this issue fully disposes of this contention, noting that in view of the arid nature of the land, his failure to attempt any form of artificial irrigation constituted the lack of a "bona fide" effort, required by 43 U.S.C. sec. 164, and that the land examiner's comment about "good faith" (Br. 25) did not refer to the cultivation requirements of 43 U.S.C. sec. 164 (Admin. Rec., R. 103-107).

We are unable to ascertain which of the numerous arguments made in the briefs filed below Reed intends to press on this appeal by his incorporation by reference (Br. 7-8). Therefore, we cannot answer them. Such incorporation by reference does not appear to satisfy the requirements of Rule 28(a)(4), F.R.App.P., that the argument of the appellant's brief "shall contain the contentions of the appellant with respect to the issues presented, and the reasons therefor, * * *."

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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OCTOBER 1968

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MAR 10 1969

DON R. THOMPSON AND MILDRED THOMPSON,
Petitioners

v.

COMMISSIONER OF INTERNAL REVENUE,
Respondent

ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONERS

FILED

DEC 30 1968

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DON R. THOMPSON AND MILDRED THOMPSON,

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v.

COMMISSIONER OF INTERNAL REVENUE,

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ON PETITION FOR REVIEW OF THE DECISION OF THE
TAX COURT OF THE UNITED STATES

REPLY BRIEF FOR THE PETITIONERS

I

THE STATUTE IS NOT SO PERFECTLY CLEAR AND
SUSCEPTIBLE OF ONLY ONE MEANING THAT RESORT
SHOULD NOT BE HAD TO STATUTORY CONSTRUCTION.

The basic thrust of respondent's brief is that the language of the statute is clear and unequivocal. Petitioners' opening brief discussed the ambiguity of the statute (pp. 9-10) and the Tax Court itself recognized that the language of the statute is ambiguous. As the Supreme Court said in U.S. v. Correll, 88 S.Ct. 445, 389 U.S. 299 (20 AFTR 2d 5845) (fn. 16), "More than a dictionary is thus required to understand the provision here involved, and no appeal to the 'plain language' of the section can obviate the need for further statutory construction." The Correll case involved the question of travel expenses while away from home for federal income tax purposes, but the caveat of the Supreme Court would seem to be as applicable to the tax language with which we are here concerned. The Supreme Court has also pointed out, in a nontax case, National Woodwork Manufacturers Association v. N.L.R.B., 386 U.S. 612 (1967, fn. 5), "Before the true meaning of a statute can be determined consideration must be given to the problem in society to which the legislature addressed itself . . ."

II

AT TRIAL, RESPONDENT ADMITTED THAT IF RESORT TO
LEGISLATIVE INTENT WAS PROPER, THEN PETITIONERS
WERE ENTITLED TO THE INVESTMENT CREDIT.

At the time of trial, petitioners understood that respondent based his case on the "lack of ambiguity" argument, and admitted that if there was ambiguity in the statute petitioners were entitled to the investment credit. In the footnote to page 13 of respondent's brief before

this Court, respondent incorrectly states petitioners' argument on this point. Petitioners do not contend that Commissioner's attorney "admitted that they should have the investment credit available to them." What petitioners contend, as is set forth in point 2 on page 6 of petitioners' opening brief to this Court, is that respondent admitted at trial that if the statute was ambiguous, then the intent of Congress was not to deny the petitioners an investment credit in such a circumstance as this. Petitioners would suggest that the Court read the appropriate section of the transcript (p. 7, lines 11-23) and determine for itself what respondent's attorney was admitting or not admitting. As pointed out by the Tax Court in another matter (Frances M. Cole, TC Memo 1960-278) ". . . It is axiomatic that Courts and opposing parties are entitled to rely on admissions of counsel made during the trial of a cause; they are officers of the Court representing their client, and their admissions so made bind their principle. Pratt v. Conway, 49 S.W. 1028 (Mo. Sup.)."

III

IT IS UNCONTROVERTED THAT THE 1963 ACQUISITION OF THE PROPERTY BY PETITIONERS WAS A PURCHASE AND WAS SO TREATED BY RESPONDENT--AND THE TAX COURT FINDING TO THE CONTRARY IS WITHOUT SUPPORT.

The page 13 footnote to respondent's brief is an admission that the respondent did treat the repossession "as a purchase for purposes of computing gain . . ." While this is not controverted anywhere in the proceedings, the acknowledgement that the repossession transaction was treated as a purchase for all federal income tax purposes, although carefully avoided throughout the body of respondent's brief, is an admission of the correctness of one of the four specifications of error set forth by

petitioners on page 6 of their opening brief. The Tax Court found, as a fact, that a purchase had not taken place in 1963 (R. 101). Said the Tax Court, "In the first place, it (the investment credit) only applied to property acquired by purchase after December 31, 1961. Petitioners first acquired this property in or about 1957." This finding of fact was directly contrary to the stipulations, the positions of both parties, and now to this admission in the page 13 footnote to respondent's brief before this Court. If for no other reason than this erroneous finding of fact on the part of the Tax Court, this case should as a minimum be remanded for further proceedings before that Court.

IV

RESPONDENT TREATS THE 1963 TRANSACTION AS ONE WHERE A NOTE WAS USED TO PURCHASE PROPERTY IN ORDER TO FIND A TAXABLE GAIN ON DISPOSITION OF THE NOTE, BUT ARGUES THAT NO TRANSACTION TOOK PLACE IN ORDER TO DENY A SMALL AMOUNT OF INVESTMENT CREDIT ON THE SAME TRANSACTION.

The respondent argues that the petitioners "invested no additional funds in the property after 1957." (Brief 5). In fact, the petitioners owned a negotiable promissory note, which taxpayers transferred as the consideration in connection with their purchase of the property in 1963. That negotiable promissory note was property, that property was the consideration paid for the assets acquired in 1963, and the transaction in which this happened met the definition of "purchase" set forth in the Internal Revenue Code and specifically made applicable to this transaction by the Congress. See argument I, pp. 8 and 9 of petitioners' opening brief.

When it comes to collecting tax on the disposition of the note, respondent is there with an extended hand eager to take the position that the petitioners purchased the subject property in 1963 because that position

produces revenue; but when it comes to allowing an investment credit, the extended hand is withdrawn and respondent's attitude changes to a complete disavowal that anything ever happened to change the relation of the petitioners to the property at any time during the period 1951 through 1963. It seems to the petitioners that the government must be held to some standard of consistency, and not allowed to play a "head's I win, tails you lose" type of game in the tax treatment of a simple transaction. Since petitioners were taxed on the theory that they paid for this property with the note that they owned, and thus realized gain on the disposition of the note, then the government should not be able to argue that in fact the property was not purchased in 1963 after all.

V

THE COMMITTEE REPORT'S EXAMPLES INVOLVE SITUATIONS WHERE THE BUYER USED THE EQUIPMENT IMMEDIATELY BEFORE THE PURCHASE AS WELL AS BEING SITUATIONS WHERE THE BUYER WAS NOT ADDING TO HIS PRODUCTIVE FACILITIES. PETITIONERS QUALIFY FOR THE CREDIT ON BOTH TESTS.

On page 9 of its brief, respondent argues that the examples in the Committee Report are not intended "to illustrate the necessity for immediacy, but instead, show that the credit is not available where an asset acquisition does not result in the expansion or modernization of the user's productive facilities." Respondent does not attempt to deny, however, that the three examples do all deal with situations where the person using the property after the acquisition is the same person who used it immediately before the acquisition. Respondent does not explain through what sort of extrasensory perception it is able to tell what the Committee was attempting to illustrate with its examples. Certainly, use immediately before the change of ownership was one of the things that each example had in common. Another

the user's productive facilities."

Prior to the purchase in 1963, petitioners had no productive facilities. They had previously sold their business and were not engaged in any business operation at all. As to them, the purchase of these assets in 1963 was an expansion of their productive facilities.

On page 11 of its brief, respondent argues that "The sale and subsequent foreclosure by taxpayers should not enable them to claim a credit which was designed to encourage additional investment after December 31, 1961." But Congress deliberately put an exception to the new investment rule into the statute to cover up to \$50,000 of used equipment. It put a definition of "purchase" into the statute, and the taxpayers' transaction clearly meets that definition. In terms of the economy as a whole, no purchase after 1962 of used equipment which had been originally purchased new before 1962 added anything to the economy, but nevertheless such purchases were covered by the investment credit as used equipment purchases up to a limit of \$50,000.

If petitioners transferred their note to a controlled corporation prior to repossessing the property, and the corporation had been the entity which actually proceeded to engage in the purchase transaction in question here, there seems no question under the language of the statute that that corporation would have been entitled to receive an investment credit. And, if the corporation had made an election to be taxed under the provisions of Section 1372, that investment credit would have been passed through and available to the individual stockholders, petitioners herein, on their personal individual income tax returns. It seems ridiculous to assume that Congress, which put the \$50,000 allowance for used equipment into the statute

as a benefit for small business, would have so exalted form over substance as to put such a premium upon slight changes in the form of doing business as is implied in the argument of respondent.

VI

THE COMMITTEE'S EXAMPLES BASICALLY INVOLVED SITUATIONS WHERE THE COMMITTEE WOULD HAVE ANTICIPATED THAT THERE WOULD BE NO INVESTMENT CREDIT RECAPTURE. THAT, IN ONE EXCEPTIONAL SITUATION UNDER THE REGULATIONS SUBSEQUENTLY PROMULGATED, A RECAPTURE COULD POSSIBLY RESULT, DOES NOT ALTER THE GENERAL STATEMENT.

On page 12 of its brief, respondent argues that taxpayers are incorrect with regard to the three examples in Section 1.48-3(a) of the regulations. Respondent bases that contention on the fact that in one of the three situations cited there is a possible factual pattern in which there would be a recapture of the investment credit. That there may be an exception to a general rule does not make the general rule any the less valid.

Respondent also advances the interesting proposition that somehow there is no relationship between the regulations promulgated by the Treasury Department in 1967 and the statute as enacted by the Congress in 1952. The argument is that "A prior statute could not have been intended to correct a subsequent regulation." But respondent misconstrues petitioners' argument. Petitioners' argument is simply that Congress was aware of the implications of the statute it was enacting, and that in the three examples given in the Committee Report on Section 48(c), Congress logically contemplated that a recapture transaction would not be involved. Unless respondent is taking the position that Treasury regulations are, in themselves, the enactment of legislation, petitioners find it a little hard to follow

the argument and feel that respondent has simply not understood what petitioners are trying to say, which is that in trying to explain the abuse that Section 48(c) was attempting to forestall, Congress was aware of what the reasonable interpretation of its own language should be and was using as examples situations where it did not think the investment credit would be recaptured.

VII

SAYING THAT A REPOSSESSION CAN NEVER QUALIFY
FOR THE INVESTMENT CREDIT CREATES AN IMPEDIMENT
TO LEGITIMATE TRANSACTIONS AND WAS NEVER INTENDED
BY CONGRESS.

Respondent's final argument that the interpretation it advances is not a deterrent to deferred payment sales any more than it is to other sales again exalts form over substance. What petitioner was pointing out is that if a seller is going to have to sustain an investment credit recapture as a result of the sale of property, the seller is going to be less willing to enter into a deferred payment sale. He will now know that if he does have to repurchase the property, he will in no wise be able to recoup the investment credit which he has had to pay back because of the sale. Thus, advisors to sellers will have to advise them that a sale that is not a deferred payment sale is preferable, and the taking of other collateral than the property being sold is desirable, since foreclosure on that other collateral will not mean that an investment credit cannot be obtained upon its acquisition. Or instead of making a sale, the "seller" will now cast his transaction in the form of a lease with an option to purchase for a nominal amount after all payments have been made. This

is a result in no wise directed by Congress anywhere in the statute nor even by the Treasury Department in its regulations.

VIII

AN "ABUSE" IS A DELIBERATE AND VOLUNTARY ACT. PETITIONERS INCURRED A TAX LIABILITY OF OVER \$4,000 AS THE RESULT OF THEIR REPOSSESSION, AND IT IS HARDLY TAX AVOIDANCE OR "ABUSE" TO ALLOW THEM AN INVESTMENT CREDIT OF \$2,000 IN THE SAME TRANSACTION.

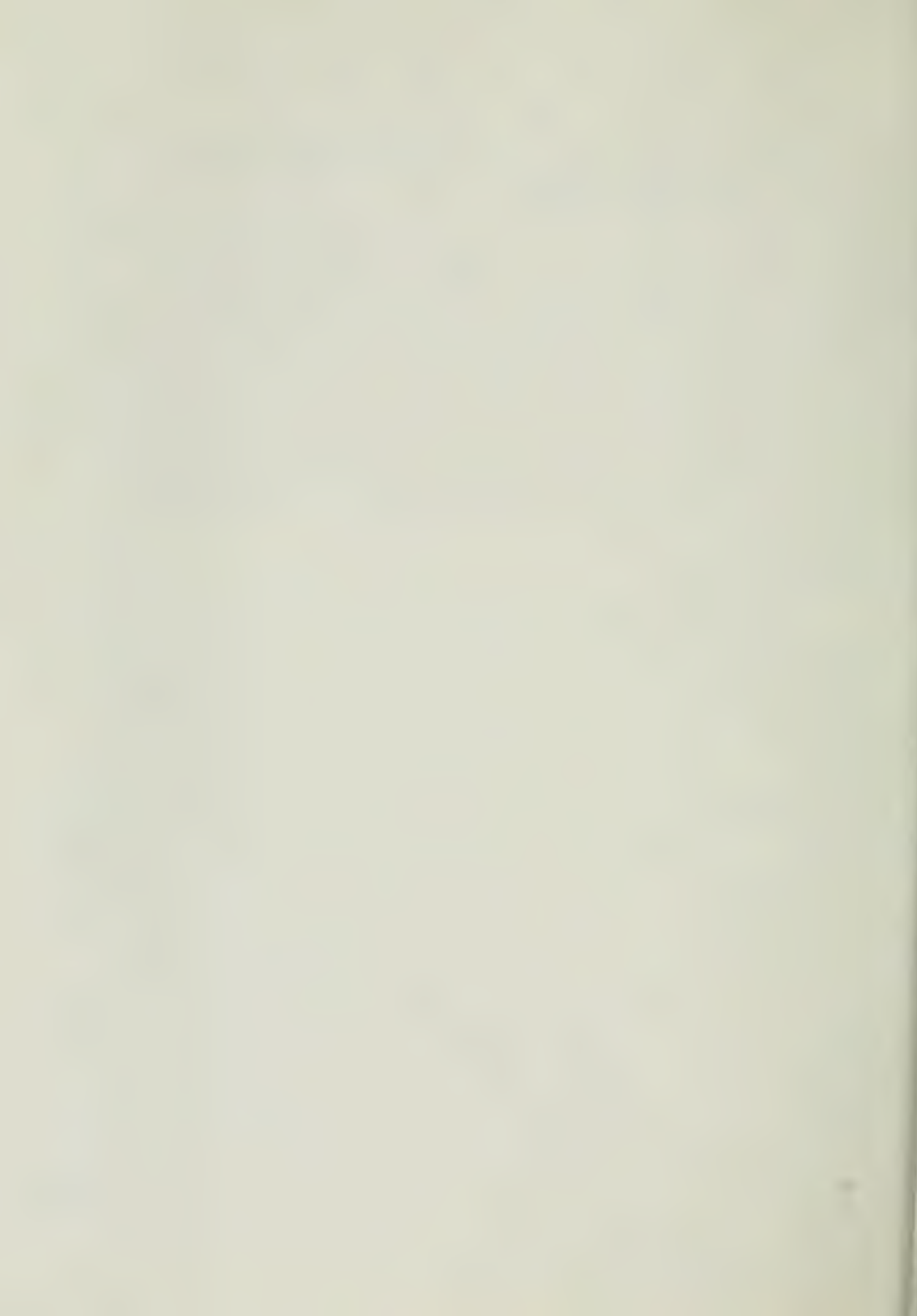
The language with which we are concerned in Section 48(c) was enacted "to prevent abuse." The idea of preventing an abuse is that the abuse situation is one which is somehow within the control of the person who is perpetrating the abuse. A sale that is followed by a repossession some time later of the property that is sold is hardly a planned transaction carried out to garner tax benefits. To say that the petitioners were perpetrating an abuse is stretching the idea of tax avoidance to irrational limits. They had a \$19,593.49 gain on repossession taxed to them (R. 7), which was the major cause of their \$4,350.43 tax deficiency for 1963 (R. 6). The maximum investment credit petitioners could obtain if they won this case is \$2,164. The examples in the Committee's Report are all situations where the taxpayer is voluntarily taking an action in order to achieve certain tax and economic benefits. The instant situation simply does not fit into that pattern.

IX

PETITIONERS WAIVE ORAL ARGUMENT AND SUBMIT THEIR
CASE WITH THIS BRIEF.

Because of the rather clear-cut nature of the issues here involved, petitioners herewith submit their case to the Court with the filing of this brief and waive their right to oral argument before the Court. Petitioners would not wish the Court to construe their failure to appear for oral argument as a lack of interest in the outcome of this matter, but rather as a reflection of the confidence taxpayers have in the ability of this Court to fairly decide this issue based upon the record and the briefs.

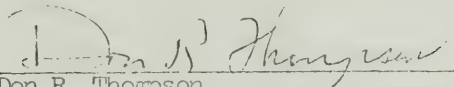
Petitioners have already expended more than the amount that is in controversy in bringing this case to the stage it is now in. However, petitioners have felt that the issue is of importance. The only other taxpayers who will suffer from the holding of the Tax Court are also small businessmen. The extension of the investment credit to only up to \$50,000 of used equipment per year rather effectively limits its availability to the small business people of the United States. It was to benefit them that the Congress enacted this provision. A purchase of property through repossession of property previously sold as effectively restores that property to productive use and as positively benefits the economy as does any other purchase of productive property. It is petitioners' firm conviction that the spirit of the legislation as to used equipment, which was designed to furnish an incentive to small businessmen and a help to small business in coming into being and in effectively competing, does not support the narrow interpretation that is being advanced by respondent.

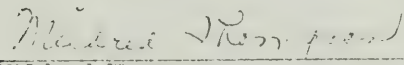


CONCLUSION

For the reasons stated above, the decision of the Tax Court is erroneous and should be reversed.

Respectfully submitted,


Don R. Thompson



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December 23, 1968

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


Don R. Thompson, Petitioner

December 23, 1968

CERTIFICATE OF SERVICE

It is hereby certified that service of this brief has been made on respondent by mailing four copies on this 27 day of December, 1968, in an airmail envelope, with postage prepaid, properly addressed to respondent as follows:

Mitchell Rogovin
Assistant Attorney General
U.S. Department of Justice
Washington, D.C. 20530

Don R. Thompson

by

Betty J. Jushong

No. 22,752 ✓

United States Court of Appeals
For the Ninth Circuit

FISHEL PRODUCTS Co., a copartnership consisting of Edward R. Fishel and John D. Fishel,

Appellant,

vs.

COMMODITY CREDIT CORPORATION, AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE and UNITED STATES OF AMERICA,

Appellees.

BRIEF OF APPELLANT

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FILED

MAY 1962

U.S. COURT OF APPEALS
NINTH CIRCUIT

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No. 22,752

United States Court of Appeals

For the Ninth Circuit

FISHEL PRODUCTS Co., a copartnership consisting of Edward R. Fishel and John D. Fishel,

Appellant,

vs.

COMMODITY CREDIT CORPORATION, AGRICULTURAL STABILIZATION AND CONSERVATION SERVICE and UNITED STATES OF AMERICA,

Appellees.

BRIEF OF APPELLANT

STATEMENT OF JURISDICTION

Jurisdiction rests in the United States District Court, for the Eastern District of California, by virtue of the fact that the contract between the parties was to be performed at Kingsburg, California, and this is a suit against a corporation of the United States of America.

28 U.S.C. 1291 provides:

“The courts of appeals shall have jurisdiction of appeals from all final decisions of the district

courts of the United States . . . except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

Suit has been filed by Fishel Products Company, a small food processing firm in Kingsburg, California, against Commodity Credit Corporation to recover \$26,630.50, the contract price for various shipments of bulgur which was processed by Fishel Products Company at its plant in Kingsburg, accepted by Commodity Credit Corporation, and shipped to Saigon, Viet Nam. Appellant's First Amended Complaint also seeks damages in the amount of \$116,145.88 for wrongful termination of contract. The first and second causes of action are based on the premise that a direct right of action exists for breach of contract since the contract was terminated in mid-term. Appellant asserts the Wunderlich Act (41 U.S.C. 321-322) is not controlling because the subject matter was not a "dispute arising under this contract", under Article 39 of the Contract providing that "any dispute concerning a question of fact arising under this contract" shall be decided by the Contracting Officer or Designee of the Agency.

The third cause of action asserts that the decision of the Contract Disputes Board is not binding because Appellant has new evidence which was not presented at the hearing before the Board with respect

to the grossly excessive counterclaim for wheat which was sold at private sale when it could have been salvaged and cleaned at nominal cost on the basis which the Commodity Credit Corporation failed to properly mitigate damages.

The third and fourth causes of action allege that the wheat could have been reconditioned for a nominal charge and instead of reconditioning it, Commodity Credit Corporation sold the wheat and tried to use the price received at a private sale as a measure of its damages.

The fifth cause of action sets forth that the counterclaim of \$159,967.07 was presented for the first time on the second day of a four-day hearing before the Contract Disputes Board. Plaintiff objected to the presentation of the claim at the hearing of the Board, and it was prevented from preparing for and submitting evidence on the counterclaim, and the issues raised thereby were to be separated and reserved for a later decision which was subsequently rendered by the Board without an opportunity on the part of Plaintiff to submit evidence on the counterclaim at an open hearing.

The decision of the Contract Disputes Board, using private sales of the wheat as the measure of damages rather than the nominal cost to reclean and salvage the wheat, was so erroneous as to imply bad faith.

The decision of the Contract Disputes Board was arbitrary in that the counterclaim for \$159,967.07 was presented for the first time on the second day of a

four-day hearing before the Contract Disputes Board, Plaintiff had not been previously advised of such counterclaim and the Board did not allow Appellant an adequate opportunity to prepare for the issues raised by the counterclaim. Such action by the Board was arbitrary and capricious and implied bad faith.

Appellant was not allowed the right to answer and litigate the counterclaim presented by defendant, was assured by the Contract Disputes Board it would have an opportunity to answer and litigate these claims, and that denial of this opportunity was so arbitrary and capricious as to imply bad faith.

Defendant, Commodity Credit Corporation, moved the Court for Summary Judgment under Rule 56 on the ground that the decision of the Board was supported by substantial evidence and is *final and conclusive* on the rights of the parties. The District Court granted Summary Judgment in favor of defendant on the sole basis that the decision of the Board was supported by substantial evidence and the decision was not procured by fraud.

Page 19 of the Decision of the Contract Disputes Board states:

“Attorney for CCC at the end of his opening statement sought to serve on the Petitioner the Contracting Officer’s findings of fact and a determination of the amount of damages claimed by CCC against Petitioner resulting from failure of performance under the contracts. A copy of the findings and the determination together with

supporting documents was offered in evidence to support the Contracting Officer's computation of the CCC claim. Petitioner's attorney objected to this procedure on the grounds that it was too late for Petitioner to meet the claim for these damages at this hearing. After hearing both attorneys on the question, the Board refused to admit the damage claim into evidence at that time and held in abeyance its ruling as to whether it would be accepted in evidence at the hearing. (Tr. p. 20). Later, on the third day of the hearing, the Presiding Officer ruled that in the interest of disposing of this entire matter as promptly as possible CCC's claim would be admitted into the record. . . ."

The Declaration of John D. Fishel sets forth that Balfour-Guthrie Company subsequently negotiated for resale the salvaged grain after cleaning. The Declaration shows that the grain was reconditioned at a nominal charge and the measure of damages, if any, as a matter of law, should have been the reconditioning costs. The Declaration of John D. Fishel states that the counterclaim was not presented until the second day of a four-day hearing, which is supported by the record of the Contract Disputes Board. The Declaration states, and the Board's own findings indicate, that the Petitioner was not permitted to prepare for its defense on the counterclaim, and that the Fishel Products Company had been assured by the Contract Disputes Board that there would be an opportunity to litigate the very substantial issues raised by the \$159,967.07 counterclaim.

ISSUES

1. Is the Wunderlich Act, requiring an administrative determination under the "disputes" clause of the Contract, applicable to a contract which is terminated for alleged default shortly after its inception.

2. Does finality attach to decisions of law made by the Contract Disputes Board.

3. Did the Disputes Board act capriciously and arbitrarily so as to imply bad faith in asserting a \$159,967.07 claim for the first time after the commencement of the hearing and in failing to give Appellant an opportunity to prepare for and present evidence on said issue at an open hearing.

4. Whether the District Court has failed to review the decisions of law made by the Contract Disputes Board.

5. Whether an issue of fact exists which requires a reversal of the Summary Judgment granted by the District Court.

ARGUMENT

THE WUNDERLICH ACT, REQUIRING AN ADMINISTRATIVE DETERMINATION UNDER THE "DISPUTES" CLAUSE OF THE CONTRACT, IS NOT APPLICABLE TO A CONTRACT WHICH IS TERMINATED FOR ALLEGED DEFAULT SHORTLY AFTER ITS INCEPTION.

Plaintiff, Fishel Products Company, filed this action for damages based on a *terminated* contract. This case does not stem from a dispute under a performed contract, but one which was terminated by Commodity Credit Corporation for alleged default shortly after its inception and prior to completion. Article 39 of the Standard Specifications of the contract provides:

"Except as may otherwise be provided in the contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the contracting officer, or designee of agency . . ."

The distinction is recognized between a dispute "arising under this contract" and a cause of action for damages on a terminated contract. In *Compudync Corporation v. Maxon Construction Co.*, 248 Fed. Supp. 83, the Court stated, at page 85:

"Once the contract has been terminated as occurred here, it no longer exists and there can be no 'factual dispute' under it."

". . . In addition, there is no hint whatsoever from the remainder of the disputes clause that it encompasses factual issues that exist after the contract ceases to exist.

"Secondly, the purpose of the disputes clause is to expedite performance of the contract and to

avoid initial resort to the Courts with the resultant delay, expense and likely aggravation of damages. Determination of factual disputes by the Contracting Officer can often lead to a quick and satisfactory resolution of issues and completion of the contract with minimum of lost time and money.

"However, once the contract has been terminated pursuant to its termination clause, the duties of the parties to perform have come to an end. No longer is there any need for a quick resolution of issues since one party, relying on a contractual provision, has discharged the other of any responsibility. While the discharging party may still be liable in damages for breach of contract, the position of the parties is fixed, and the terminating party is free to find someone else to complete the contract. A dispute clause is designed to expedite the completion of a contract, but once the parties have come to the point where one has terminated the contract, no useful purpose exists to hold things in abeyance since a decision of the Contracting Officer in favor of the non-terminating party does not re-institute the contract under any of its provisions that this court has read. Consequently, where the contract has been terminated, the rationale of the disputes clause ceases to exist."

Similarly, in *E. I. du Pont de Nemours & Co. v. Lyles & Lang Construction Co.*, 219 Fed. 2d 328, the Court stated, at page 333:

"We think it clear that the trial Judge correctly refused to hold the action barred for failure to proceed under the clause or to limit the issues in

the case by excluding all issues of fact. In the first place, we do not think that the disputes clause has any application to a case such as this. . . ."

"... The disputes clause was evidently intended to furnish a ready means of administrative settlement of questions arising during the performance of the contract which might delay or interfere with performance, not to provide for unilateral determination of the amount due under the contract upon its termination."

In *United States v. Duggan*, 210 Fed. 2d 926, Eighth Circuit, March, 1954, a contract between the Government and a contractor was terminated by default of the contractor. The United States asserted a claim of \$1,700,000.00 against the contractor. The defendant asserted that as a condition precedent to the filing of suit for damages, the United States was required to comply with the terms of the "Disputes" clause of the contract for the administrative determination of claims.

In holding that on a terminated contract the District Court had jurisdiction to entertain the claim, the Court stated, at page 932:

"We do not find in the contract any agreement between the parties for the administrative determination of the claims of the Government against the Contractor upon the termination of the contract. Even if there has been in the contract no express reservation of claims in favor of the Government against the Contractor, we think the Contractor would not be relieved from

liability to the Government for any loss proximately resulting from the failure of the Contractor to perform its obligations under the contract or its legal obligation to reimburse the Government for moneys received by the Contractor to which it was not entitled.

"The District Court's conclusion that it was without jurisdiction to entertain the claim of the Government in advance of an administrative determination of the amount justly due upon the termination of the contract, we think is not logically tenable. . . . The Government was, in our opinion, entitled to have its claim against the Contractor judicially determined."

And further:

". . . Obviously, we think this Article provided for nothing more than an administrative determination of questions of fact which might arise during the course of the performance of the contract and prior to its termination."

The Court held that matters of this complexity should not be determined on summary judgment, stating, at page 933:

"This was not the kind of a controversy which properly could be terminated by dismissing the Government's claim. Complicated and doubtful issues of fact and law can seldom be satisfactorily determined by dismissing a pleading for insufficiency of statement.

". . . The issues raised by the Government's claim and the objection of the trustee should have been determined after a trial and after affording

each of the parties a full opportunity to introduce any and all evidence which has any bearing on those issues."

To the same effect is *United States v. Heaton*, 195 Fed. Supp. 742, where the Court stated, in denying summary judgment under similar facts, at page 745:

"For the reasons that the disputes clause applies neither to controversies arising after the termination of the contract nor to actions for breach of contract the Court holds that the findings of fact made pursuant to the disputes clause are not final and binding in this action, and Plaintiff's motion for partial summary judgment is denied."

In *Silberblatt & Lusher, Inc. v. United States*, 1944, 101 Sup. Ct. 54, at page 81, the Court said:

"Such a dispute (breach of contract) the Contracting Officer is not authorized to decide finally; his authority is limited to disputes arising under the contract; it does not extend to disputes over a breach of the contract."

In *Boomer v. Abbott*, 1953, 121 Cal. App. 2d 449, 263 Pac. 2d 476, the Court held that a disputes clause was not applicable to questions arising out of a breach of contract. Citing numerous cases the Court said, at page 462:

"The cases interpreting federal contracts have clearly established that actions that amount to an actual breach of the contract are not covered by the 'disputes' article."

263 Pac. 2d 476, at page 484.

In *Continental Illinois National Bank & Trust Co. v. United States*, 101 Fed. Supp. 755, certiorari denied 343 U.S. 963 (72 Sup. Ct. 1057, 96 L. Ed. 1361), it was held that claims for unliquidated damages for breach of contract are not proper subjects of departmental adjudication. See also *Peter Kiewit Sons Co. v. United States*, 74 Fed. Supp. 165; *Blair v. United States*, 147 Fed. 2d 840, rehearing granted 150 Fed. 2d 676.

In *United States v. Utah Construction Co.*, 86 Sup. Ct. 1545, cited by the Commodity Credit Corporation, the Court stated, at page 1555, that suits on breach of contract, where the contract is terminated, are not in the Wunderlich Act standards:

“Thus the settled construction of the disputes clause excludes breach of contract claims from its coverage whether for purposes of granting relief or for purposes of making binding findings of fact that would be reviewable under Wunderlich Act standards rather than de novo.”

The various decisions relied upon by Commodity Credit Corporation involve appeals by either the Government or the contractor arising from a dispute “under the contract” where the contract was performed and the controversy involved extra work. These cases involve a performed contract under which a dispute arose and not a contract terminated prior to completion for alleged default.

The Wunderlich Act does not change the provisions of the disputes clause in the contract. The Wunderlich

Act uses substantially the same terminology as contained in the disputes clause in referring to "... a dispute involving a question arising under such contract"

As the cases clearly state, the purpose of the disputes clause is to resolve expeditiously disputes between the parties under a contract which has been performed. Plaintiff at no time agreed to submit the counterclaim of \$159,967.07 to the Board for decision.

**FINALITY DOES NOT ATTACH TO DECISIONS OF LAW
MADE BY THE CONTRACT DISPUTES BOARD.**

Section 41, United States Code 322, provides that no government contract shall contain a provision making final, on a question of law, the decision of an administrative official. The decision of the Contract Disputes Board is not final in all respects, and the District Court's granting of Summary Judgment in effect holds that neither a factual nor a legal issue exists. It is submitted that even under the Wunderlich Act a party is entitled to a trial on the merits, at which time the record of the administrative agency must be reviewed on all legal issues. The District Court has limited its decision to a finding that the Board's decision is supported by substantial evidence as was not procured by fraud, but has not reviewed the legal basis for the decision itself. The application of the proper measure of damages is a question of law to be decided by this Court and as to which no decision of the Disputes Board is final.

The findings of fact of the original Decision are:

“After review and due consideration of the record the Board finds as follows:

1. The appeal was timely filed.
2. CCC by delivery of wheat to Petitioner before performance security had been furnished did not in so doing lose its right to subsequently demand such security.
3. CCC did not wrongfully reject bulgur tendered to it even though on the basis of subsequent tests it later accepted most of such bulgur.
4. CCC did not by any wrongful action make it impossible for Petitioner to furnish performance security.”

The third alleged Finding of Fact is that the Commodity Credit Corporation did not wrongfully reject bulgur tendered to it even though on the basis of subsequent tests it later accepted most of such bulgur. This is not a finding of fact but a conclusion of law, and even under the Wunderlich Act the Court is not bound by any conclusions of law. If the bulgur was ultimately found to be acceptable, the original rejection of it must have been wrongful. We are not necessarily dealing here with the question of whether the bulgur which was ultimately accepted was suitable or not; that would be a factual issue. Once it is determined, after testing, that the bulgur was properly made and accepted, then the prior rejection of it must have been wrongful. Similarly, whether the Commodity Credit Corporation lost its right to subsequently demand performance security by undertaking delivery under the contract is a question of law, not a

factual issue. The mere fact that a legal issue is labeled under the heading "Findings of Fact" does not make it any less a legal issue. The Decision of the Contract Disputes Board as to whether the Contracting Officer was "legally justified in terminating Petitioner's right to proceed under the contracts" is a question of law and under 41 USC 22 is not binding on the Court. The District Court restricted its decision to a limited review under the Wunderlich Act, while Plaintiff is at the very least entitled to a review of the record de novo on all legal issues under 41 USC 22, and the Summary Judgment on the question of whether there is substantial evidence to support the findings of the Board does not constitute a decision on the legal questions which were before the Board. The propriety of the Board's decision allowing the filing of a counterclaim of \$159,967.07 during the hearing itself is a legal issue subject to judicial review.

CONCLUSION

Plaintiff's suit for breach of contract is clearly not under the Wunderlich Act because it does not involve a claim against the Commodity Credit Corporation "under the contract," but is a suit for breach of a terminated contract. Accordingly, the Appellant should be allowed a trial de novo on its action for damages, and in addition upon the counterclaim. Commodity Credit Corporation in effect has secured a \$159,967.07 judgment against Fishel Products Company on a demand that was not even presented prior

to the hearing before the Contract Disputes Board, and upon which the Plaintiff and Appellant did not have an opportunity to prepare for its presentation, and even when first presented was not accepted by the Hearing Officer as a basis for the litigation. Commodity Credit Corporation feels the procedure followed was an expeditious way of disposing of this claim, and while it may be a "small" amount to Commodity Credit Corporation in view of the huge sums with which it generally deals, Appellant should not be legally liable under the general guidelines of due process to have judgment of \$159,967.07 rendered against it by an arbitrary act of expediency on the part of the Contract Disputes Board. The failure to give Appellant's counsel notice of the counterclaim and an opportunity to prepare for it and to have evidence produced in an open hearing, constitutes an arbitrary and capricious act and violates due process. Even if the Wunderlich Act applied, with regard to restricting the Court's ability to determine de novo factual issues, the rendering of a \$159,967.07 judgment under the procedure followed by the Board is arbitrary and capricious, such as to imply bad faith.

Since the Summary Judgment was rendered on the basis that all of the proceedings before the Contract Disputes Board are final, the Judgment should be reversed, and the case should be set for trial on the merits. Appellant is entitled to a judicial determination of any legal issue before the Board, which the District Court did not do in granting Summary Judgment. As the Declaration of John D. Fishel indicates,

Appellant also is entitled to a trial on certain of the factual issues pertaining to the ~~Cross~~-Complaint and the measure of damages which was asserted. The issue of whether the Commodity Credit Corporation was entitled to terminate the contract is a legal one and upon which the Court should rule in a trial on the merits.

For the foregoing reasons it is respectfully submitted that the Summary Judgment should be reversed.

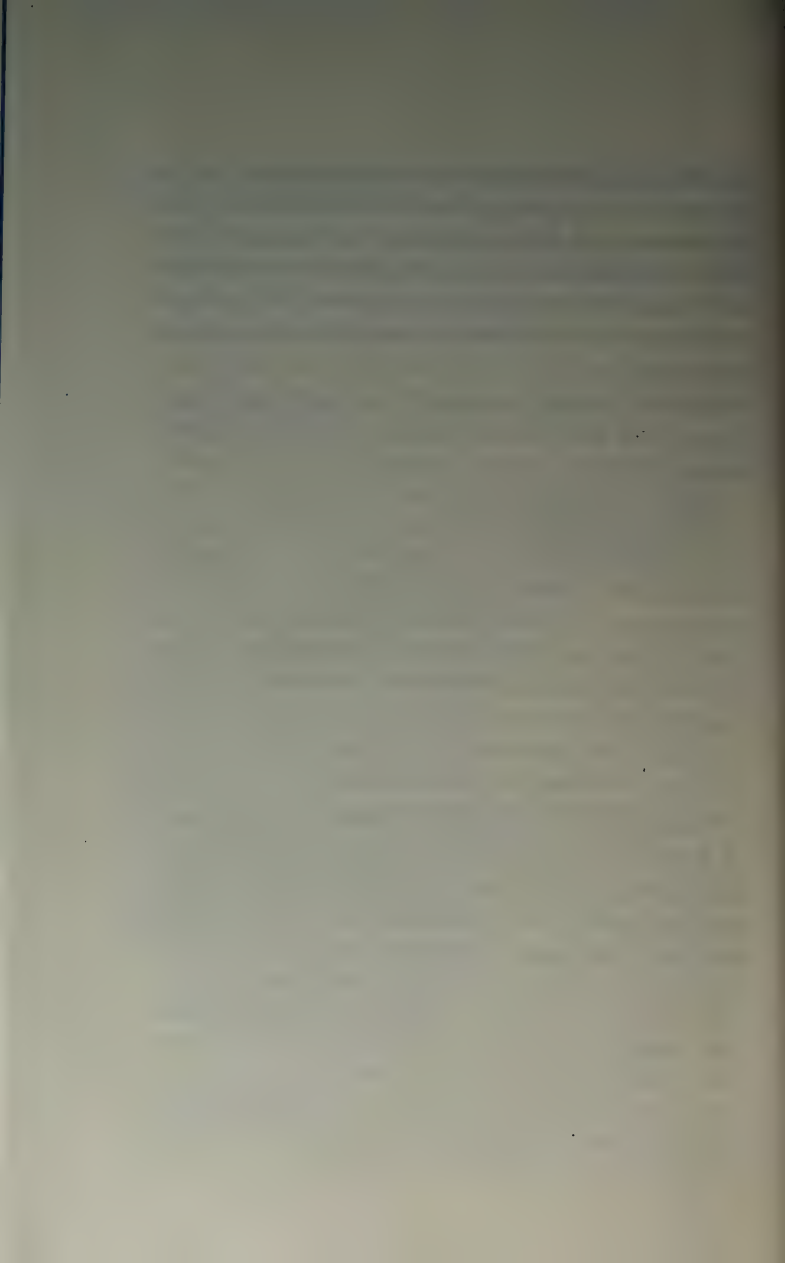
Dated, Fresno, California,
May 22, 1968.

Respectfully submitted
CREEDE, DAWSON & GILLASPY,
By FRANK J. CREEDE, JR.,
Attorneys for Appellant.

CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK J. CREEDE, JR.,
Attorney for Appellant.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FISHEL PRODUCTS COMPANY, a
copartnership consisting of EDWARD
R. FISHEL and JOHN D. FISHEL,

Appellants,

vs.

COMMODITY CREDIT CORPORATION,

Appellee.

BRIEF FOR THE APPELLEE

APPEAL FROM
UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

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IN THE UNITED STATES COURT OF APPEALS
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FISHEL PRODUCTS COMPANY, a
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Appellant,

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COMMODITY CREDIT CORPORATION,

Appellee.

BRIEF FOR THE APPELLEE

COUNTER-STATEMENT OF THE FACTS

I

INTRODUCTION

This is an appeal from the action of the United States District Court for the Eastern District of California granting a motion for summary judgment in favor of the Commodity Credit Corporation ^{1/} (hereinafter referred to as "CCC"). The Court

1/ The Commodity Credit Corporation is a corporation whose stock is wholly owned by the United States of America. See Commodity Credit Corporation Charter Act, 15 U. S. C. 714. et seq.

granted summary judgment in favor of the CCC in the amount of \$159,967.07, plus interest, on the ground that all issues in the case were heard and decided by the Contract Disputes Board (hereinafter referred to as "Board"), which decision was supported by substantial evidence and was not obtained by fraud. By granting the CCC's Motion for Summary Judgment, the District Court ruled against appellants (hereinafter referred to as "Fishel") on their Complaint, and in favor of CCC on its counterclaim.

The CCC deems it necessary to make the following counter-statement of the facts in order to accurately state the relevant facts in the administrative proceeding and in the District Court hearings.

II

THE STATUTE INVOLVED

The applicable statute in this case is the "Wunderlich Act" (41 U. S. C. 321, 322) which provides:

"No provision of any contract entered into by the United States, relating to the finality or conclusiveness of any decision of the head of any department or agency or his duly authorized representative or board in a dispute involving a question arising under such contract, shall be pleaded in any suit now filed or to be filed as limiting judicial review of any such decision to cases where fraud by such

official or his said representative or board is alleged: Provided, however, that any such decision shall be final and conclusive unless the same is fraudulent or capricious or arbitrary or so grossly erroneous as necessarily to imply bad faith, or is not supported by substantial evidence."

(41 U. S. C. 321).

"No Government contract shall contain a provision making final on a question of law the decision of any administrative official, representative, or board."

(41 U. S. C. 322).

These statutes were enacted by Congress to expand the basis for judicial review of administrative decisions in Government contracts containing "disputes" clauses. See United States v. Bianchi, 373 U. S. 709, 713 (1963). In United States v. Wunderlich, 342 U. S. 98, 100 (1951), the court determined that judicial review was limited to cases founded on fraud, i. e., "conscious wrongdoing, an intention to cheat or be dishonest". The effect of the Wunderlich Act is to authorize judicial review where it can be shown that the administrative decision was fraudulent, capricious, arbitrary, so grossly erroneous as to necessarily imply bad faith, or is not supported by substantial evidence.

III

THE CONTRACTS

This appeal arises out of two contracts for processing by Fishel of wheat, owned by the CCC, into bulgar. Copies of the contracts [GR(M) 5499 and GR(M) 5516] are contained in File Number 1 of the Record of the Administrative proceeding (hereinafter referred to as "Ad. Rec. No. 1") under the section entitled "Petitioner's Appeal". The "Announcement For Processing of Wheat Into Bulgar" dated May 18, 1962 (Ad. Rec. No. 1), and the "Uniform Contractual Provisions" (Ad. Rec. No. 1), incorporated by reference in the contracts, contain the provisions pertinent to this lawsuit. Provision is made for Performance Security (Section XVII of the Announcement) and Specifications for Bulgar (Section VI of the Announcement). In addition, the contracts contained detailed provisions setting forth contractual remedies in favor of the CCC with respect to the following:

- a. Defective Performance (Section VII of the Announcement);
- b. Delay or Failure to Perform (Article 23 of the Uniform Contractual Provision);
- c. Liquidated Damages to CCC (Section XIII of the Announcement);
- d. Liability -- contractor shall be liable for loss, damage, destruction, or deterioration of wheat delivered for processing (Article 22

- of the Uniform Contractual Provisions);
- e. Demurrage Charges (Article 21 of the Uniform Contractual Provisions);
 - f. Determination of Weights and Grades on CCC Wheat -- provides contractor shall pay expense of reweighing when contractor requests it (Section V (a) of the Announcement).
 - g. Inspection and Checkloading -- contractor shall pay the cost thereof (Section XIV of the Announcement).

Article 23 of the Uniform Contractual Provisions, which deals with delay or failure to perform, states:

"If Contractor refuses or fails to perform within the time specified in the contract with respect to any shipment, or any extension of such time, Agency may, by written notice, terminate the right of Contractor to proceed with the servicing of all or any part of the commodity which has not been serviced. In addition to any damages which may be provided for in the contract for refusal or failure to perform within the time specified, Agency shall be entitled to recover the difference between the contract price and the amount which Agency may pay for having any part of the commodity serviced elsewhere, and any additional costs it may incur in connection therewith. . . ."

The disputes clause of this contract, Article 39 of the Uniform Contractual Provisions, states:

"Except as may otherwise be provided in the contract, any dispute concerning a question of fact arising under this contract which is not disposed of by agreement shall be decided by the Contracting Officer, or designee of Agency, who shall reduce his decision to writing and mail or otherwise furnish a copy thereof to Contractor. Within 30 days from the date of receipt of such copy, Contractor may appeal by mailing or otherwise furnishing a written appeal addressed to the head of Agency, or such other persons as Agency may designate to receive such appeal and the decision of the head of Agency or his duly authorized representative for the hearings of such appeals shall be final and conclusive, unless determined by a court of competent jurisdiction to have been fraudulent, arbitrary, capricious, or so grossly erroneous as necessarily to imply bad faith or not supported by substantial evidence:"

This provision is part of the standard disputes clause found in most Government contracts.

IV

ADMINISTRATIVE PROCEEDING

The Administrative Proceeding resulted from an appeal by Fishel on April 10, 1963, of the action of the Contracting Officer terminating Fishel's right to proceed under the contracts. The contracts were terminated on the dual grounds that Fishel (1) failed to deliver bulgar in accordance with the terms of the contracts, and (2) failed to furnish the performance bond required by the contracts (Ad. Rec. No. 1). In the telegram, dated April 4, 1963, terminating Fishel's right to proceed, Fishel was also put on notice that the CCC would hold the company liable for all damages resulting from its failure to perform (Ad. Rec. No. 1, Exhibit 15).

An Administrative Hearing on Fishel's appeal was held before the Board in Fresno, California on November 19th, 20th, 21st and 22nd, 1963. The transcript of this Hearing contains 586 pages of testimony (hereinafter referred to as "Tr. "). The entire record of the Administrative Proceeding, including pleadings and exhibits, is contained in six files (Ad. Rec. No. 1 through No. 6).

On the first day of the hearing, CCC's attorney presented Fishel with the Contracting Officer's findings of fact, and a determination as to the amount of damages claimed by CCC (Tr. pp. 18-19, 401-402; Ad. Rec. No. 4, Exhibit 11). The Board ruled that the Contracting Officer's findings were determinations of fact within the meaning of the disputes clause of the contract. The

Board allowed Fishel additional time within which to present any evidence they might have relating to the Contracting Officer's determination as to the amount of damages (Tr. pp. 397-400). During the Hearing, Fishel's attorney stated Fishel only desired to present contravening evidence by way of affidavit, if such information became available (Tr. pp. 486-487).

At the conclusion of the Hearing, Fishel's attorney pointed out that, if the Board determined the contracts had been properly terminated, the issue of damages would become moot. He suggested the Board decide the issues in two stages: First, whether the contracts had been properly terminated, and, if so, second, the amount of damages resulting from Fishel's failure to perform. The Board adopted this suggestion (Tr. pp. 579-580). After the hearing was closed (Tr. pp. 581-584) counsel for Fishel reaffirmed his agreement with this method of proceeding by letter to the Board dated January 8, 1964 (Ad. Rec. No. 6).

The written decisions of the Board were made in two parts. The Board first determined, on May 8, 1964, that the contracts had been properly terminated, and stated: "Parties have thirty days within which to submit additional evidence with respect to the amount of the damages suffered by CCC including evidence on the point of whether CCC took proper action to mitigate its damages." (Exhibit "K" to CCC's Answer and Counterclaim filed on Oct. 19, 1965 in the District Court).

Thereafter, Fishel filed a supplemental answer to the CCC's administrative claim for damages, alleging CCC failed to

mitigate damages (Ad. Rec. No. 6). However, Fishel did not submit any evidence in support of their allegations, either at that time, or at any other time during the Administrative Proceeding or during the District Court hearings. Thereafter, on November 30, 1964, the Board made its determination concerning damages (Exhibit "L" to CCC's Answer and Counterclaim filed on October 19, 1965 in the District Court). Some items claimed by the CCC were allowed and other items were disallowed. The total damages awarded by the Board to the CCC against Fishel were \$159,967.07.

The Board denied Fishel's claim that the CCC had failed to mitigate its damages basing its denial upon the substantial and undisputed evidence contained in the Administrative Record (Exhibit "L" to CCC's Answer and Counterclaim filed on October 19, 1965 in the District Court).

V

UNITED STATES DISTRICT COURT
PROCEEDINGS

Fishel filed their Complaint in the United States District Court for the Eastern District of California (then a part of the Southern District of California) on April 13, 1965, seeking damages for loss of profit resulting from wrongful termination of the contracts, and damages for failure to pay the agreed fee for processing wheat into bulgar. (Originally, the Complaint was against the Agricultural Stabilization and Conversation Service, and the United States of America, as well as the CCC, but on May 22, 1965, the

Court dismissed the action against all defendants but the CCC.)

Fishel's Complaint originally contained no allegations which would form a basis for judicial review under the requirements of the Wunderlich Act (41 U.S.C. 321-322). On April 27, 1967, Fishel filed an Amended Complaint containing the required allegations. CCC filed a Counterclaim in this action on October 19, 1965, seeking damages of \$159,967.07, the amount determined by the Board, plus interest.

CCC filed a Motion for Summary Judgment on September 15, 1966, on the ground that the decision of the Board was final. This Motion was based both on the disputes clause of the contracts and the Wunderlich Act. After briefs were filed and argument heard, the Court, on December 11, 1967, filed its Order stating, in part " . . . All the issues involved in this case were heard and determined by the Contract Disputes Board, whose decision is supported by substantial evidence and was not obtained by fraud. . . ."

Fishel filed a motion for reconsideration which was denied by the Court, and Judgment was entered on January 24, 1968, awarding the CCC the sum of \$159,967.07, plus interest at the rate of 7% per annum from November 30, 1964, together with costs in the amount of \$20.00, against Fishel Products Company, a copartnership, Edward R. Fishel, and John D. Fishel, and each of them.

THE CONTESTED ISSUES

I. Appellants have specified five issues to be resolved in this appeal. However, they present arguments with respect to only their first two issues. For reasons of clarity and accuracy of analysis under the authorities cited, Appellee has reworded the Appellants' two issues and restated them below as three separate issues. Appellee considers the last three issues stated by the Appellants in their Brief (page 6), to have been abandoned through Appellants' failure to present any arguments or authorities in their support. Therefore, no counterarguments or authorities are presented with respect to the three issues.

II. The issues raised by the Appellants in this appeal may be more exactly stated as follows:

- A. Is the CCC's claim based upon the relief provisions of the contracts, or upon the general law of damages resulting from a breach of the contract? (A restatement of part of Appellants' issue 1.)
- B. Is the administrative determination of a dispute, arising out of Government contracts which contain the standard disputes clauses, final and conclusive, even though the contracts were terminated? (A restatement of part of Appellants' issue 1.)

C. Does the record of the Administrative Proceeding in this matter reveal any error of law? (A restatement of Appellants' issue 2.)

ARGUMENT

I

THE CCC'S CLAIM IS BASED UPON THE PROVISIONS OF THE CONTRACTS.

The CCC's claim is for remedies provided in the contracts, and the administrative determination with respect thereto, is final and conclusive. Even if the CCC's claim were based upon the general law of damages resulting from breach of the contracts, the administrative determination of the factual issues decided by the Board cannot be disregarded nor can the factual issues be tried de novo by the District Court.

The distinction between a) issues arising in connection with the enforcement of a right conferred by a Government contracts which contain a "disputes clause", and b) an action for damages resulting from breach of such contract, is discussed at length in United States v. Utah Construction and Mining Co., 384 U.S. 394 (1966). The former is subject to determination under the disputes clause within the limitations prescribed by the Wunderlich Act. The administrative determination based thereon is final and conclusive, subject only to judicial review. No administrative proceeding

is required with respect to the latter (an action for damages based on the principle of the general law of damages). An original action may be filed in Court with respect thereto. If there has been an administrative proceeding under the disputes clause, however, the relevant findings of fact in such proceedings are binding in Court and a trial de novo may not be had (Id. at 420). This result is required by the terms of the contractual agreement of the parties, and the result is in harmony with the principles of collateral estoppel and res adjudicata (Id. at 421-422).

In the case now before this Court, the Board in its November 30, 1964 determination of damages relied strictly upon the terms of the contracts to decide the amount of Fishel's liability (Exhibit "L" to CCC's Answer and Counterclaim filed on October 19, 1965 in the District Court). Some items of damage claimed by the CCC were allowed by the Board, and other items were disallowed. As to the allowance or disallowance of the items of damage, the Board's determination was properly based upon the applicable provisions of the contracts, and not upon the general law of damages.

II

THE BOARD'S DECISION IS FINAL EVEN
THOUGH THE CONTRACTS HAD BEEN
TERMINATED.

The disputes clause of the contracts in question remain operative even though the contracts were terminated. Subject only to the limitations of the Wunderlich Act, the administrative

determination pursuant to the disputes clause is final and conclusive upon the parties and not subject to judicial review.

Appellants argue that an administrative determination under the disputes clause of the contracts is not required where the contracts are terminated for alleged default by the contractor. Appellants misconceive the theory upon which damages were determined by the Board in the administrative proceeding. Use of the word "default" used by the Appellants suggests that they believe the Board relied upon a breach-of-contract theory to determine the amount of damages. As has been mentioned above, the Board relied upon specific provisions of the contracts to determine the damages.

Furthermore, the authorities relied upon by Appellants are factually inappropriate to this case and/or have been superseded by more recent cases. Appellants cite: Compudyne Corporation v. Maxon Construction Co., 248 F. Supp. 83 (E. D. Pa. 1965); E. I. du Pont de Nemours & Co. v. Lyles & Long Construction Co., 219 F.2d 328 (4th Cir. 1955); United States v. Duggan, 210 F.2d 926 (8th Cir. 1954); United States v. Heaton, 195 F. Supp. 742 (D. Neb. 1961); and Boomer v. Abbott, 121 Cal. App.2d 449, 263 P.2d 476 (1953). ^{2/} In all of these cases there had been no administrative determination based on the contract disputes clause prior to the time the court action was filed. In addition, the

^{2/} Appellants also cite and quote from the case of "Silverblatt & Lasher, Inc. v. United States, 1944, 101 Sup. Ct. 54". However, Appellee has been unable to find this case at the citation provided.

Compudyne, E. I. du Pont and Boomer cases involve only private parties and not an agency of Government.

The factual irrelevance of this line of authorities was noted in United States v. Hamden Co-operative Creamery Co., 297 F.2d 130, 133 (2nd Cir. 1961), and Silverman Brothers, Inc. v. United States, 324 F.2d 287, 289 (2nd Cir. 1963). The court, in these cases, held that where there had been an administrative determination based on a disputes clause, the court was bound by the findings of fact in the administrative proceeding, even though the contracts had been terminated.

The Hamden case involved contracts for the sale of a food product (powdered milk) to the CCC. In denying an appeal from the decision of the District Court which granted the CCC's motion for summary judgment based upon the decision of the Contract Disputes Board, the court stated:

"Inasmuch as the appellant has appeared, briefed, and argued its case before the Contract Disputes Board without reservation and in compliance with Article 22, it is now too late for it to assert that the Board could not decide the factual issues presented in appellant's dispute with the Government. This disputes clause provided a method of arbitration by which factual disputes arising between the contracting parties were to be resolved. E. I. DuPont De Nemours & Co. v. Lyles & Lang Constr. Co., 219 F.2d 328, 334 (4 Cir. 1955),

cert. denied 349 U.S. 956, 75 S. Ct. 882, 99 L. Ed. 1280. In none of the cases relied upon by the appellant, E. I. DuPont De Nemours & Co. v. Lyles & Lang Constr. Co., *supra*; United States v. Duggan, 210 F.2d 926 (8 Cir. 1954); Jacobs v. United States, 239 F.2d 459 (4 Cir. 1956), cert. denied 353 U.S. 904, 77 S.Ct. 666, 1 L. Ed. 2d 666 (1957); and 42nd St. Fotoshop, Inc. v. United States, 137 F. Supp. 313 (S.D. N.Y. 1955), had either party submitted the dispute there involved to the agency board. We add that disputes concerning the times of infestation and its discoverability seem to us to be especially appropriate for administrative adjudication under Article 22." (297 F.2d 130 at 133).

In the Silverman case, after the trial court had granted summary judgment on the basis of an administrative determination, the Appellate Court stated:

"The defendant contends that the court was not bound by the Wunderlich Act because the two issues upon which it wished to present evidence --government justification in terminating the contract and the excess costs--are outside the scope of the disputes clause, as they arose out of and after the termination of the contract. Cases are cited by the defendant which hold, in effect, that

the disputes clause is limited to disputes arising under a contract prior to its termination or breach. See, e. g. Jacobs v. United States, 239 F.2d 459 (4 Cir. 1956), cert. denied, 353 U.S. 904, 77 S.Ct. 666, 1 L.Ed. 666 (1957); E. I. DuPont De Nemours & Co. v. Lyles & Lang Const. Co., 219 F.2d 328 (4 Cir.), cert. denied, 349 U.S. 956, 75 S.Ct. 882, 99 L.Ed. 1280 (1955); United States v. Duggan, 210 F.2d 926 (8 Cir. 1954); United States v. Heaton, 195 F. Supp. 742 (D. Neb. 1961).

"While most of the cases cited by defendant are distinguishable in some facet or other from the present case, we prefer to follow the holdings in the Second Circuit that the disputes clause includes any dispute concerning a question of fact arising under the contract whether it arises during performance of the contract or after its completion. Moran Towing & Transportation Co. v. United States, 192 F. Supp. 855 (S.D.N.Y. 1960), appeal dismissed, 290 F.2d 660 (2 Cir. 1961). See also Allied Paint & Color Works, Inc. v. United States, 309 F.2d 133 (2 Cir. 1962), cert. denied, 375 U.S. 813, 84 S.Ct. 41, 11 L.Ed. 2d 48 (1963); United States v. Hamden Co-operative Creamery Co., 297 F.2d 130 (2 Cir. 1961)." (324 F.2d 287 at 289).

The contracts in the case now before the Court contain specific provisions for redress in favor of the CCC in case of any defaults or deficiencies by the contractor in the performance of his duties under the contracts. By these provisions the parties converted what would otherwise have been claims for damages for breach of contract into claims payable under the specific provisions of the contracts. Any defaults and/or deficiencies of the contractor would therefore be considered to have arisen "under the contracts". This is a practice, followed by many Government contracting agencies, as was noted and accepted in United States v. Utah Construction and Mining Co., 384 U.S. 394. The Court, in that case, stated,

"This trend has continued to the point where the field of claims for breach of contract that are not regarded as arising under the contract is becoming very narrow indeed." (Id. at 418).

In the Utah Construction case, the court held the coverage of the disputes clause as a matter susceptible of contractual determination based on the intention of the parties (Id. at 407).

The effect of Appellants' contention in the instant case would be to require the CCC to choose between the provisions of the contracts giving it the right to terminate on one hand, and the provisions establishing the right to recover damages in an agreed manner for failure to perform on the other hand. The contracts in question clearly reflect that this election was not the parties' intention. The express language of the contracts is clearly to the

contrary. Article 23 of the contracts sets forth that, in the event of the contractor's failure or refusal to perform within the time specified in the contracts, the CCC "may, by written notice, terminate the right of contractor to proceed. . . . In addition to any damages which may be provided for in the contract for refusal or failure to perform within the time specified [CCC] shall be entitled to recover the difference between the contract price . . . " and substitute performance by another (Ad. Rec. No. 1).

The argument that the CCC must sacrifice its right to terminate under the terms of the contract in order to rely upon the provisions of the contract with respect to damages is not only contrary to common sense, but would lead to an unreasonable result. The contracts in this case were terminated for two basic reasons: (1) Appellants' demonstrated inability to perform in accordance with the terms of the contracts, and (2) Appellants' failure and refusal to provide adequate performance security required by the contracts (Ad. Rec. No. 1; Exhibit 15 - Telegram to Fishel of April 14, 1963). When the contracts were terminated, any further attempts by Fishel to perform would only have led to additional damages to CCC (Tr. 450-466, 511-515; Ad. Rec. No. 5 - Exhibits 14a through 14m). It would be unreasonable in the extreme to say that the Government must stand idly by while a contractor, who has demonstrated his inability to perform, continues to increase the damages the Government has already suffered, in order for the Government to be able to assert its right to recover damages for

failure of the contractor to perform. This is especially true where, as in this case, one of the reasons for terminating the contractor's right to perform was the contractor's failure to provide performance security. The purpose of performance security was, of course, to insure that the CCC would be reimbursed for its damages.

Recent decisions of the United States Supreme Court, which review cases involving administrative determinations under the standard government contract disputes clause, reveal Appellants' argument regarding the effect of terminating a contractor's right to perform is untenable.

In United States v. Joseph A. Holpuch Co., 328 U.S. 234 (1946), the Court held the failure of a party (to a Government contract containing the standard disputes clause) to exhaust its administrative appeal, bars it from bringing suit in the Court of Claims to recover damages.

In United States v. Carlo Bianchi & Co., Inc., 373 U.S. 709 (1963), it was held that, except for questions of fraud, a reviewing court is limited to the administrative record in determining the finality to be given the administrative decision which was based on the standard disputes clause in a Government contract.

In United States v. Anthony Grace & Sons, Inc., 384 U.S. 424 (1966), it was held that, if upon judicial review, the administrative record was found to be inadequate on any issue, the matter should be remanded to the administrative agency for further

proceedings rather than the reviewing court make an original record on such issue. This holding rested on an application of the administrative procedures contractually bargained for, and the rights of parties to contract and provide for their own remedies in case of a breach of the contract.

In United States v. Utah Construction & Mining Co., 384 U.S. 394 (1966), the Court held that breach of contract claims are excluded from the coverage of the standard disputes clause. It was held, nevertheless, that factual issues properly determined administratively may not be retried de novo in the subsequent contract action for relief which was unavailable under the disputes clause of the contract. The Court stated:

"Likewise, when the Board of Contract Appeals has made findings relevant to a dispute properly before it and which the parties have agreed shall be final and conclusive, these findings cannot be disregarded and the factual issues tried de novo in the Court of Claims when the contractor sues for relief which the board was not empowered to give." (Id. at 420).

This decision was based upon the contractual agreement of the parties, and the Court noted the result is harmonious with general principles of collateral estoppel. Numerous cases were cited by the court to illustrate the fact that courts have not hesitated to apply res judicata to enforce the decision of administrative agencies acting in a judicial capacity in resolving disputed issues of fact

(Id. at 421-422).

The foregoing principles were summarized in Crown Coat Front Co. v. United States, 386 U.S. 503 (1967), where the Court stated:

"It is now crystal clear that the contractor must seek the relief provided for under the contract or be barred from any relief in the courts. . . .

"Even when the contractual scheme has run its course and the contractor is free to file his suit in court, he is not entitled to demand a de novo determination of his claim for an equitable adjustment. The evidence in support of his case must have been presented administratively and the record there made will be the record before the reviewing court. United States v. Carlo Bianchi & Co., 373 U.S. 709, 83 S. Ct. 1409, 10 L. Ed. 2d 652; United States v. Utah Construction & Min. Co., 384 U.S. 394, 86 S. Ct. 1545. The court performs principally a reviewing function. Only if it is alleged and proved that the administrative determination was arbitrary, capricious, or not supported by substantial evidence may the court refuse to honor it. This much is clear not only from the disputes clause itself but from the Wunderlich Act. In that statute, entitled 'An Act to Permit Review', 68 Stat. 81, Congress

widened the scope of judicial review but at the same time recognized the finality of the administrative decision absent the specified grounds for setting it aside. The focus of the court action is the validity of the administrative decision. . . ."

(Id. at 512-513).

III

NO ERROR OF LAW IS REVEALED IN THE RECORD OF THE ADMINISTRATIVE PRO- CEEDING.

Appellee is in accord with Appellants' assertion that finality does not attach to decisions of law made by the Board. However, this is nothing more than a recitation of the second section of the Wunderlich Act, 41 U.S.C. 322. The simple answer to Appellants' argument is that, in granting CCC's Motion for Summary Judgment, the District Court determined all issues of law in favor of the CCC, and as a matter of law, upheld the administrative determination with respect to all issues of fact.

It should be noted that the so-called "issues of law" discussed in Appellants' Brief were never raised by Appellants in the District Court. Accordingly, Appellants may not raise these issues for the first time now, on appeal, inasmuch as an appeal is limited to the theory of the case contended for by Appellants in the trial court. Helvering v. Wood, 309 U.S. 344, 348-349 (1940). Accord: McCullough v. Kammerer Corp., 323 U.S. 327, 328-

329 (1945).

Although an appellate court may affirm a judgment upon grounds not urged in the lower court, it may not reverse a trial court upon such grounds. Palmer v. Reconstruction Finance Corporation, 164 F.2d 466, 468 (2nd Cir. 1947), cert. denied; New York, New Haven & Hartford R. R. Co. v. Reconstruction Finance Corp., 334 U.S. 811 (1948).

Contrary to Appellants' assertion, judicial review is limited to the administrative record and a trial de novo is not permitted. This Court has no more latitude with respect to this review than did the District Court. Appellants failed to convince the District Court that any error of law had been committed. Appellants have again implied to this Court that legal error was committed, but they have totally failed to support this contention, either by reference to the administrative record, or by citations to legal authority. This Court should therefore dismiss such contentions as being totally without merit.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Judgment of the United States District Court, for the Eastern District of California, be sustained.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

22,754

CECIL R. REED,

Appellant,

vs.

STEWART L. UDALL, Secretary of the Department of the Interior of the United States, and individually; J. R. PENNY, Nevada State Director, Bureau of Land Management, U.S. Department of the Interior, and individually and VAL B. RICHMAN, District Manager, Carson City Office, Bureau of Land Management, U.S. Department of the Interior, and individually.

Appellees

*See this
file for
additional papers*

APPEAL FROM THE DISTRICT COURT
OF THE UNITED STATES FOR THE
DISTRICT OF NEVADA

BRIEF FOR THE APPELLANT

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1
2 IN THE UNITED STATES COURT OF APPEALS
3 FOR THE NINTH CIRCUIT
4

5 CECIL R. REED,

6 Appellant,

No. 22,754

7 vs.

8 STEWART L. UDALL, Secretary of the
9 Department of the Interior of the United
10 States, and individually: J. R. PENNY,
11 Nevada State Director, Bureau of Land
12 Management, U. S. Department of the
13 Interior, and individually: and VAL B.
14 RICHMAN, District Manager, Carson
City Office, Bureau of Land Management,
U. S. Department of the Interior, and
individually,

Appellees.

15
16 APPEAL FROM THE DISTRICT COURT
17 OF THE UNITED STATES FOR THE
18 DISTRICT OF NEVADA
19

20
21 BRIEF FOR THE APPELLANT
22
23
24
25
26

1 II. STATEMENT OF PLEADING AND FACTS

2 ESTABLISHING JURISDICTIONAL BASIS.

3 Jurisdiction of this court and of the district court below is
4 based upon the following pleadings and facts:

5 1. On April 15, 1955, Cecil R. Reed, appellant here and
6 plaintiff below, filed with the Reno, Nevada Land Office, Bureau of
7 Land Management, U. S. Department of the Interior, an application,
8 Nevada 034275 (Ex. E) under the general homestead laws (43 U.S.C.
9 161 et seq.) for entry upon 160 acres of lands owned by the United
10 States and located in what is known as the Carson Valley area of
11 Douglas County, State of Nevada (R. 2-3).

12 2. Appellees Richman and Penny, defendants below, were
13 employees of the United States who classified or supervised classification
14 of the lands applied for, and such lands were classified as
15 suitable for agricultural entry under the general or "ordinary"
16 homestead laws, such classification decision bearing date of April
17 29, 1957 (Ex. F; R. 3-4).

18 3. Reed, on or about May 25, 1957, entered upon the lands,
19 established a residence there, proceeded to comply with the Federal
20 homestead laws, and by reason thereof acquired certain rights and
21 interests in and to the lands so applied for, so classified, and so
22 entered (R. 4).

23 4. On May 11, 1961, Reed submitted final proof of compliance
24 with the homestead laws to the Nevada Land Office (Ex. K; R. 4).

25 5. By letter from the land office dated March 1, 1962 (Ex. M;
26 R. 4-5), Reed was notified that his final proof was "not acceptable

1 to issue a patent for the one hundred and sixty (160) acres embraced
2 in your entry, but, for only one-half of the entry, or eighty (80) acres.
3 Reed was by said letter, given thirty (30) days to relinquish a spec-
4 ified eighty (80) of the entered acres, failing which, he was advised,
5 the land office at Reno would initiate a contest of Reed's final proof,
6 such contest to be designed to cancel the entire one hundred and
7 sixty (160) acre entry.

8 6. On April 18, 1962, the United States of America, as
9 contestant acting through defendant Penny, and notwithstanding earlier
10 advice and conclusion by the Nevada Land Office that Reed's final
11 proof was acceptable to issue a patent for at least eighty (80) acres,
12 caused action to be initiated in the form of a contest designed to
13 invalidate, cancel, and make nugatory Reed's entire one hundred and
14 sixty (160) acre homestead entry (Ex. V; R. 4).

15 7. Issues were joined and a hearing had on June 20, 1963
16 before a Bureau of Land Management hearing examiner, said hearing
17 conducted under applicable regulations of the Department of the
18 Interior (Part 221, Title 43, C. F. R., redesignated on March 31, 1964
19 as Part 1840; 29 F. R. 4326); and the Administrative Procedure Act
20 (Sec. 1001 et seq, Title 5, U. S. C. A.) with testimony formally reported
21 (Tr. 1-142; R. 4).

22 8. By written decision dated December 13, 1963, United
23 States v. Cecil R. Reed, Nevada 3296 (Admin. File) the examiner
24 concluded Reed was entitled to have his entry go to patent upon sub-
25 mission of technical proof respecting military service, remanded the
26 case to the Nevada Land Office, in effect dismissing the contest

1 charges (R. 5-6).

2 9. On January 9, 1964, the United States appealed the hearing
3 examiner's decision to the Director, Bureau of Land Management (R.
4 6); by decision dated July 7, 1964, the Bureau of Land Management,
5 through its Acting Director, issued a decision, United States v.
6 Cecil R. Reed, Nevada 034275, Contest 3296, reversed the decision
7 of the hearing examiner, rejected the final proof of Reed, and ordered
8 the entire entry cancelled (Admin. File; R. 6).

9 10. Reed appealed to the Secretary of the Interior and there-
10 after, by decision dated September 29, 1965, United States v. Cecil
11 R. Reed, A-30354, that office affirmed the decision of the Bureau of
12 Land Management (Admin. File; R. 6).

13 11. Reed asserted that by reason of the referenced four (4)
14 administrative decisions - - Nevada land office; hearing examiner;
15 Director, Bureau of Land Management; and the Secretary of the
16 Interior - - he had exhausted his administrative remedies in that the
17 applicable regulations of the department, Sec. 1844.9, Title 43, C. F.
18 R. (Apr. 1, 1964 Supp.), provide that no appeal will lie in the De-
19 partment of the Interior from a decision of the Secretary (R. 6).

20 12. On November 29, 1965, Reed filed a complaint in the
21 United States District Court for the District of Nevada (R. 2-10),
22 asserting, inter alia, that the final administrative decision of the
23 Secretary of the Interior was arbitrary and erroneous, against the
24 law, not sustained by the evidence and contrary to the facts; that,
25 under applicable law, Reed was entitled to have his entry allowed and
26 to have patent issue to him; that the decision of the Secretary was

arbitrary and erroneous because not consistent with applicable principles of equity; and that Reed was entitled as a matter of right to have the decision of the Secretary judicially reviewed by a Federal district court pursuant to the following statutory authorities (R. 3):

(a) that the individuals named as defendants are officers and employees of the United States or an agency thereof with the intent and meaning of Section 1391 (e), Title 28, U.S.C.A.: that the action brought is one within the scope and purview of Section 1361, Title 28 U.S.C.A., and subsection (e) (3) of said Section 1391:

(b) that the action brought was one to judicially review actions or decisions of the named defendants, acting or purporting to act in an official capacity or under color of legal authority, as such review is contemplated and authorized by Section 10 of the Administrative Procedure Act (Sec. 1009, Title 5, U.S.C.A.) and by Section 1391 (e), Title 28 U.S.C.A.; and that jurisdiction and venue resided in the Nevada district court for such statutory reasons, and the further fact that plaintiff is a resident of Nevada, and that the real property involved in the action is located in Douglas County, Nevada, as set out in the complaint (R. 2-3).

13. Plaintiff below sought this relief: (R. 8-9): temporary restraining order, restraining defendants' interference with plaintiff's use and enjoyment of the property; a preliminary injunction, pending a final and complete hearing on the merits; a permanent injunction, full judicial review of the decision of the Secretary of the Interior, reversal of the Secretary's decision, and such orders or writs as are deemed necessary to make fully force and effective the

1 decision of the hearing examiner.

2 14. Answer of the United States (R. 26-31) was filed,
3 including agreement by the Department of the Interior (R. 30),
4 assuring maintenance of "****the status quo as far as the land
5 involved is concerned during the pendency of the litigation." (R. 30)
6 thus obviating formal action on the restraining order and injunctive
7 requests.

8 15. Minutes of the Court (R. 47) for September 9, 1966
9 reflect pre-trial determinations, including this entry:

10 "****Counsel for the Plaintiff makes an offer of
11 proof, to which the same is rejected on the grounds
12 that the evidence is limited to the Administrative
13 Record lodged with the Clerk."

14 The Court thereupon ordered the matter determined on the Admini-
15 trative Record, and submission on briefs.

16 16. Plaintiff's Opening Brief (R. 50-87), Defendant's
17 Answering Brief (R. 88-108) and Plaintiff's Reply Brief (R. 110-121)
18 were filed with the District Court; under date of July 7, 1967, the
19 court below entered an "Order Granting Summary Judgment" for the
20 United States (R. 122-126).

21 17. By timely motion for new trial and motion for reconsider-
22 ation, Plaintiff below asserted inter alia that the summary judgment
23 was improperly entered (R. 127-132), and after responsive pleading
24 by the United States thereto and setting of arguments (R. 133-141) and

25 18. By Judgment entered on December 19, 1967 (R. 142-143),
26 and "Supplemental Opinion, Findings of Fact and Conclusions of Law"

1 bearing the same date (R. 144-147) the district court again found for
2 the United States, upholding the decision of the Secretary of the
3 Interior rejecting Reed's final proof and ordering cancellation of the
4 entire 160-acre entry.

5
6 19. Jurisdiction on appeal resides in the United States Circuit
7 Court of Appeal for the Ninth Circuit pursuant to Section 1291, Title
8 28 U.S.C.A.

9 10 III. STATEMENT OF THE CASE.

11 (1) Incorporation of Record.

12 Because the record here involves administrative action or
13 judicial proceedings had at five different levels -- Nevada land office
14 decision adverse to appellant Reed; hearing examiner decision
15 favorable to Reed; decision of Bureau of Land Management unfavorable
16 to Reed; decision of Secretary of the Interior affirming Bureau of Land
17 Management decision; and decision of the Nevada Federal district
18 court upholding the final determination of the Secretary of the Interior
19 -- counsel for appellant has attempted, supra, to set out background
20 information in more detail than would be required in a simple appeal
21 from a decision of a Federal district court resulting from an action
22 originating there.

23 In turn, in these circumstances, appellant incorporates by
24 reference in this brief all of the files, records, and pleadings, and
25 arguments made in the judicial and administrative proceedings below.
26 Particular reference is made: to Plaintiff's Pretrial Memorandum of
Contentions of Fact and Law (R. 27-45), and Defendant's Pretrial

Memorandum (R. 32-35), and to Plaintiff's Opening Brief (R. 50-87), Defendant's Brief (R. 88-108), and to Plaintiff's Reply Brief (R. 110-121) filed in the proceedings had in the United States District Court for the District of Nevada.

(2) The questions involved, and the manner in which they are raised.

The court below in its "Order Granting Summary Judgment" (R. 122-126) bottomed its judgment for defendants, in effect, on a single point found by the court to be dispositive of Reed's appeal from the Secretary in this language (R. 122):

We need not consider all the arguments made by plaintiff in his attack upon the proceedings in the Interior Department (R. 123) and the final decision of the Secretary inasmuch as one of them seems to us to be dispositive of the case.

The Government contest of the application for homestead patent alleged: "That the designated contestee has not met the cultivation requirements * * * in the development of his homestead entry * * *." The statute requires: "That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry and until final proof * * *." 43 U. S. C. 164. The law (43 U. S. C. 279) gives two years' credit for residence and cultivation to an honorably discharged veteran homestead entryman, but it, too, provides: "No patent shall issue to any person who has not resided upon his homestead and otherwise complied with the provisions of the homestead laws for a period of at least one year; Provided, that such compliance shall include bona fide cultivation of at least one-eighth of the area entered under the homestead laws * * *."

So plaintiff, a veteran, was required to cultivate in good faith twenty acres of his one hundred sixty acre entry to qualify for a patent. On this issue, the Secretary found as follows:

1 "Since the only entry year in which the entryman pur-
2 ported to cultivate 20 acres was his fourth, if he did not
3 cultivate 20 acres in that year, his final proof must be
4 rejected and cancelled."

5 "The appellant's allegation that he cultivated and
6 planted 20 acres of oats cannot be accepted as substantiated.
7 The land examiner, testifying on behalf of the United States,
8 stated that when he visited the land on January 5, 1962, he
9 found 'approximately twenty acres of partially cleared land'
10 (Tr. 29, 38), that all the native vegetation had not been
11 removed, and that 'sagebrush was still left (R. 124)
12 standing in the fields, which would interfere with a proper
13 tillage or cultivation of the fields' (Tr. 38). He stated
14 that he saw no evidence of tillage for a crop other than
15 native grasses (Tr. 39), and that no stubble of any oat crop
16 at all was on the land (Tr. 40). If an oat crop had been
17 grown or raised, stubble would have remained (Tr. 40)."

18 "The appellant agreed that there was no evidence of
19 an oat crop in January 1962 (Tr. 101, 102), although he
20 said it grew 8 inches high (Tr. 104). He gave no explanation
21 as to why no stubble remained *****. This argument, founded
22 on the merest of inferences, is completely unacceptable.

23 "In opposition the entryman offered only his own testi-
24 mony to support his claim that he had cultivated 20 acres. It
25 is noteworthy that he did not present either of the persons who
26 submitted statements as part of his final proof that he had
cultivated 20 acres in 1961. Since the final proof of an entryman
is required to be corroborated by the testimony of two credible
witnesses, Rev. Stat. sec. 2291 (1875), as amended, 43 U.S.C.
sec. 164 (1964), it seems that evidence of no less weight should
be required in a contest challenging lack of cultivation.

27 "The burden of proof rests on a homestead entry-
28 man to establish by a preponderance of the evidence that he
29 has met the requirements of the law. Stewart v. Penny,
30 238 F. Supp. 821 (D. Nev. 1965). Appellant's testimony,
31 standing alone without corroboration, falls far short of the
32 preponderating evidence required.

33 "Therefore, I conclude that the required number of
34 acres was not cultivated during the fourth entry year."
35 (emphasis supplied).

36 * * * * *

37 The decision below, by the Federal district court for the
38 district of Nevada, it will be seen, adopted the reasoning of the

1 Secretary of the Interior: the court below found, in effect that entryman
2 Reed's testimony " * * * standing alone without corroboration * * * does
3 not meet the preponderating evidence required. (R. 124 and supra).
4 It should be noted, parenthetically, that the Government produced only
5 a single witness, Mr. Hagihari (Tr. index, p. 1; and Tr. 1-143) and
6 that there was in fact received into evidence by the hearing examiner,
7 without Government objection the Final Proof Submission of Reed
8 (Ex. K; Tr. 13), which evidence included in the very affidavit form
9 required by law the sworn testimony of two witnesses before the officer
10 designated by the United States (Ex. J), as contemplated and required by
11 R. S. 2291, as amended, 43 U. S. C. sec. 164. The court below in
12 supporting the Secretary's finding, nevertheless, concluded (R. 124):

13 We think this finding (by the Secretary) is
14 supported by the record and justifies the decision sustaining
15 the Government contest and denying the application for
16 patent. The entryman's effort to (R. 125) comply with
17 the cultivation requirements of the homestead laws was
niggardly at best. The burden of his argument is that
the Secretary was required to accept his uncorroborated
testimony that he had cultivated twenty acres.

18 * * * * *
19 Thus delimited by the court below, the following brief state-
20 ment reflects appellant's position: Entryman Reed, in fact and in law,
21 did meet the burden of proving compliance with the homestead law, and
22 is entitled to have patent issue to the full 160 acre-entry. Reed
23 contends that, in fact and law, he had fully met the corroboration
24 requirement.

25 Additionally this observation seems in order the facts of the
26 case are not complex as to detail. The manner of factual development
and the shifts of emphasis in application of the law to them through the

administrative and judicial processes below -- at four different administrative decisional levels, and particularly in the light of the narrow base upon which the lower court decision rests -- makes determination of the manner of presentation here somewhat difficult.

To preserve appellant's position respecting the whole decision of the Secretary without expanding this brief, appellant incorporates by reference herein his Pretrial Memorandum of Contentions of Fact and Law filed in the United States District Court of Nevada (R. 37-45), together with Plaintiff's Opening Brief (R. 50-86), Plaintiff's Reply Brief (R. 110-121), and the argument therein contained.

Accordingly, appellant in this brief to the court will restate only one proposition in addition to that involving corroboration:

Appellant contends that, on the whole record, appellant-entryman is entitled to have his final proof allowed, when tested by "good faith" standards on both a legal and an equitable basis.

IV. SPECIFICATION OF ERRORS.

The district court erred in the following particulars:

1. In failing to conclude, as a matter of law, that the entryman failed to meet the burden of proving compliance with the Homestead Law.

2. In failing to conclude that, in fact and in law, the entryman is entitled to have his final proof allowed, when tested by "good faith" requirements.

V. ARGUMENT.

1. Summary of Appellant's Position.

Appellant contends that:

1 (a) The law applicable to the quality of final proof, and the
2 form of final proof, has been wholly complied with in this case. The
3 lower court, in its decision, erroneously overlooks and discounts these
4 facts: that Reed, as a part of his final proof submission filed affidavits
5 of sworn testimony of two witnesses; that the sworn testimony of these
6 two disinterested witnesses was taken before an officer designated
7 by the United States in accordance with its usual procedure; that the
8 testimony was taken following publication in a manner, at times pre-
9 scribed, and in a text mandated by the United States; that interested
10 persons, including employees of the United States, were thus noticed to
11 appear at the time such testimony was taken; and that the testimony--
12 thus adduced according to applicable statutory requirements and ad-
13 mitted into evidence without objection at the hearing before the hearing
14 examiner -- constitutes all of the corroboration of Reed's final proof
15 and testimony contemplated, or required, by the Homestead Law.

16 (b) Measured by court-declared standards, and by administra-
17 tive agency direction and decision, for weighing "good faith", the
18 whole record here supports a finding that this entryman has met those
19 standards.

- 20 2. The proof of compliance tendered by the entryman
21 in the instant case is as fully corroborated as is
22 required and contemplated by the applicable law, and
23 the entryman is entitled to issuance of a patent to his
24 full 160-acre entry.

25 Reference is made to the laws applicable to final proof:
26

1 (a) Basic Homestead Law.

2 The provisions of the Basic Homestead Law, applicable to
3 agricultural entry or "ordinary" homesteads, as in the instant case,
4 pertinent here are found codified in Title 43, U.S.C.A., secs. 161-164.

5 Sec. 164 (R.S. 2291) provides in relevant part:

6 No certificate shall be given or patent issued
7 therefore until the expiration of three years from the
8 date of such entry; and if at the expiration of such time,
9 or at any time within two years thereafter, the person
10 making such entry, * * * proves by himself and by two
11 credible witnesses that he, she, or they have a habitable
12 house upon the land and have actually resided upon and
13 cultivated the same for the term of three years
14 succeeding the time of filing the affidavit and makes
15 affidavit that no part of such land has been alienated,
16 * * * then in such case he, she, or they, * * * shall be entitled
17 to a patent as in other cases provided by law * * *
18 Provided further, That the entryman shall, in order to
19 comply with the requirements of cultivation herein
20 provided for, cultivate not less than one-sixteenth of
21 the area of his entry, beginning with the second year
22 of the entry, and not less than one-eighth, beginning with
23 the third year of the entry and until final proof. * * *
24 (emphasis supplied).

25 (b) Military Service Credit.

26 Requirements respecting proof for military veterans are
qualified by provisions now codified at Title 43 U.S.C.A., sec. 279,
in pertinent part:

* * * Credit shall be allowed for two years' service to
any person who served in the military or naval forces of
the United States * * *. No patent shall issue to any such
person who has not resided upon his homestead and otherwise
complied with the provision of the homestead laws for a
period of at least one year. Provided, That such compliance
shall include bona fide cultivation of at least one-eighth
of the area entered under the homestead laws. * * *.

(c) Statutory Provisions for Final Proof.

Provisions now codified at Title 43 U.S.C.A., secs. 251, 252.

1 and 254 are pertinent here:

2 Before final proof shall be submitted by any
3 person * * * such person shall file * * * a notice of
4 his or her intention to make final proof, stating therein
5 the description of the lands to be entered, and the names
6 of the witnesses by whom the necessary facts will be
7 established. Upon the filing of such notice, the (land
8 office) officer shall publish a notice, that such applica-
9 tion has been made once a week for the period of thirty
10 days * * *. Such notice shall contain the names of the
11 witnesses as stated in the application. At the expiration of
12 said period of thirty days, the claimant shall be entitled
13 to make proof in the manner provided by law. The Secretary
14 of the Interior shall make all necessary rules for giving
15 effect to the foregoing provisions.

16 20 Stat. 472, 43 U. S. C. A. 251. (emphasis supplied)

17 And the following section headed "Time of taking testimony
18 for final proof * * *" contains language which aids in weighing the
19 quality of support for the entryman's proof:

20 Section 251 of this title shall not be construed to forbid the
21 taking of testimony for final proof within ten days following
22 the day advertised * * *. 43 U. S. C. A. 252 (emphasis
23 supplied).

24 Title 43 U. S. C. A., sec. 254 contains provisions respecting
25 officers before whom affidavits or proofs may be made, and declares
26 that " * * * any witness making such proof" who knowingly, willfully, or
corruptly swears falsely " * * * to any material matter contained in said
proofs * * *" shall be deemed guilty of perjury.

(d) Departmental Regulations: Final Proof.

Regulations in effect at the time Reed submitted final proof
dated May 11, 1961 (Ex. J) were contained in Title 43, C. F. R., secs.
166.44 through 166.50 under the heading "Procedure Governing Submis-
sion of Final or Commutation Proof."

1 A headnote reads: 'AUTHORITY: secs. 166.44 to 166.50
2 issued under 20 Stat. 472; 43 U.S.C. 251.', the statutory and code
3 provisions quoted, supra, as sec. 251. They are now codified, Title
4 43 C.F.R. (Jan. 1, 1968 Revision) as secs. 221.1-4 (a)(1) through
5 221.1-4 (d)(2).

6 Attention is directed to the pertinent language in sec. 166.45
7 of Title 43, C.F.R. (sec. 221.1-4 (c)(1), Tit. 43 C.F.R., Jan. 1,
8 1968 Revision):

9 Any person desiring to make homestead proof should first
10 forward a written notice of his desire to the manager of the
11 land office, giving his post-office address, the number of
12 his entry, the name and official title of the officer before
13 whom he desires to make proof, the place at which the proof
14 is to be made, and the name and post-office addresses of
15 at least four of his neighbors who can testify from their own
16 knowledge as to facts which will show that he has in good
17 faith complied with all the requirements of the law. (emphasis
18 supplied.)

19 The same regulations govern time of making proof, officers qualified to
20 take proof, publication requirements, and in sec. 166.47, the provision
21 controlling in 1961, recite (emphasis supplied) that:

22 "Final proofs in all cases where the same are required
23 * * * should be taken in accordance with the published
24 notice: Provided, however, That such testimony may be
25 taken * * *."

26 (e) Regulations Controlling Government Contests.

On April 18, 1962, the United States initiated a contest of
appellant's final homestead proof in the form of a complaint (Ex. V).
The complaint itself, and the hearing examiner proceeding which
followed, was asserted by the United States and found by the hearing
examiner (Examiner's decision, December 12, 1963, United States v.
Cecil R. Reed, Admin. File, p. 1) to have been initiated and conducted

1 pursuant to Title 43 C. F. R. , Part 221, under sec. 221.67 thereof
2 relating to Government contests (now redesignated sec. 1852.2 et seq. ,
3 Tit. 43 C. F. R. , Jan. 1, 1968 Revision).

4 Regulations governing Government contests in effect at the
5 time Reed submitted final proof dated May 11, 1961 (Ex. J), were
6 carried under Part 221 under the heading "Appeals and Contests".

7 The headnote reads: "AUTHORITY. secs. 221.1 to 221.107
8 issued under R. S. 2478, as amended; 43 U. S. C. 1201." The statutory
9 provision cited reads in its entirety:

10 The Secretary of the Interior, or such officer as he may
11 designate, is authorized to enforce and carry into execution,
12 by appropriate regulations, every part of the provisions of
this title not otherwise specifically provided for.

13 R. S. 2478, 43 U. S. C. A. 1201.

14 Detailed examination of the regulations governing evidence in
15 Government contests, so far as relevant to this appeal, reveals this
16 language in sec. 221.74 (a) under heading of "Evidence" (since
17 redesignated sec. 1852.3-6 (a), Tit. 43 C. F. R. , Jan. 1, 1968 Revision):

18 All oral testimony shall be under oath and witnesses shall
19 be subject to cross examination. The Examiner may
20 question any witness. Documentary evidence may be received
if pertinent to the issue. The Examiner will summarily
stop examination and exclude testimony which is obviously
irrelevant and immaterial.

21 We turn, then, to the application of the foregoing statutory and
22 administrative regulations to the instant case.

23 (f) The Secretary's Decision and Conclusion of
24 the United States District Court.

25 As set out above (pps. 8-10, this brief) the Secretary of the
26 Interior and the district court below find unity in their rationale which

would cancel the Reed entry more than 12 years after application for entry (Ex. E, Tr. 13), and some ten years after entry was allowed (Ex. F, Tr. 13) in these words and phrases:

"In opposition (to the testimony of the lone Government witness) the entryman offered only his own testimony to support his claim that he had cultivated 20 acres. Appellant's testimony, standing alone without corroboration, falls short of the preponderating evidence required."

and the court below, having adopted the foregoing language from the Secretary's decision, determined that such finding was supported by the record, and characterized entryman Reed's position in this language (R. 125):

"The burden of his argument is that the Secretary was required to accept his uncorroborated testimony that he had cultivated twenty acres."

In support of its decision, the court below relied upon two decisions. Stewart v. Penny, 238 F. Supp. 821 (1965) was decided by the court from which this appeal is taken. The court in Stewart concluded that the burden of proof is upon the contestee and that the government bears only the burden of going forward with sufficient evidence to establish a prima facie case, and the burden then shifts to the claimant to show by a preponderance of the evidence that his claim is valid. 238 F. Supp. 821, 831, citing with approval Foster v. Seaton, 271 F. 2d 836 (1959).

We suggest, without argument because not deemed necessary to appellant's position here, that it is the Government -- and not the homestead entryman -- who is 'the proponent of a rule or order' within the meaning of the provision of the Administrative Procedure Act which imposes the burden of proof under 5 U. S. C. A. 1006 (c).

1 The court below (R. 125-126) draws heavily on language from
2 Quock Ting v. United States, 140 U.S. 417 (1891) in this fashion
3 (emphasis supplied):

4 Undoubtedly, as a general rule, positive testimony
5 as to a particular fact, uncontradicted by any one, should
6 control the decision of the court; but that rule admits of
7 many exceptions. There may be such an inherent
8 improbability in the statements of a witness as to induce
9 the court or jury to disregard the evidence, even in the absence
10 of any direct conflicting testimony. He may be contradicted
11 by the facts he states as completely as by direct adverse
12 testimony; and there may be so many omissions in his account
of particular transactions, or of his own conduct, as to
discredit his whole story. His manner, too, of testifying
may give rise to doubts of his sincerity, and create the
impression that he is giving a wrong coloring to material
facts. All these things may be considered in determining
the weight which should be given to his statements, although
there be no adverse verbal testimony adduced.

13 The court below appears to characterize Reed's testimony as related to
14 testimony having these elements -- "a particular fact, uncontradicted
15 by any one", as given "in the absence of any direct conflicting testimony",
16 and as standing "although there be no adverse verbal testimony
17 adduced".

18 It is noted that Quock Ting is read by the court below as
19 holding (R. 125) that --

20 " * * the trier of fact may give little credence to
21 evidence although uncontradicted. "

22 And the court below continues (R. 126) --

23 "It is no hardship on the entryman to require him to
24 produce sound, credible evidence of compliance which
25 he easily can prepare in the form of surveys, photographs
26 and testimony of neighbors of his work of proving up the
homestead progresses."

Following, we recite what we believe to be the controlling
judicial precedents, and the facts respecting corroboration overlooked

1 by both the Secretary and the lower court.

2 (g) Appellant's Response.

3 In the instant case, Reed filed his Notice to Make Proof on
4 March 8, 1961 (Ex. I, Tr. 13), and under date of March 13, 1961
5 received from the Nevada land office a form designated as "Instructions
6 for Publication" together with a form entitled "Notice for Publication,
7 Final Proof" (Ex. J, Tr. 13) and under date of May 11, 1961 he filed
8 his "Homestead Entry Final Proof" (Ex. K) including affidavits in the
9 form of sworn testimony taken before the officer designated by the
10 Nevada land office as required by R. S. 2291, 43 U. S. C. A. 164.

11 It is submitted that this is all the corroboration required by
12 the law, and that it is precisely the " * * * testimony of neighbors"
13 referred to, by the court below (R. 126, supra) as " * * * sound,
14 credible evidence of compliance * * * ."

15 Turning to the final proofs filed by Reed, and in behalf of Reed
16 (Exh. K, Admin. File) we find that these documents disclose that: the
17 two statutory witnesses, one of them a 69-year old neighbor, the other
18 a 40-year old neighbor, had both seen the land "many times"; that
19 both statutory witnesses, under oath before the Government's
20 designated official, testified that they lived in the vicinity; both must be
21 presumed to have been aware of the provisions of 18 U. S. C., sec. 1001
22 referred to on the affidavits they signed, advising that it is a crime
23 " * * * for any person knowingly or willfully to make to any Department or
24 agency of the United States any false, fictitious, or fraudulent statements
25 or representations as to any matter within its jurisdiction."

26 Oral testimony of Mr. Reed in the determinative crop year of

1 1961 establishes that (Tr. pps. 104 and 114-115) that Reed's custom was
2 to prepare the soil in the fall and seed in the spring, so that the "1961
3 crop year" embraced both the fall of 1960 and the spring of 1961 (see
4 particularly lines 2-26, Tr. p. 115). Taken with this oral testimony,
5 the proofs submitted by Reed, and by his two witnesses (Ex. K) disclose
6 the following, inter alia:

7 That Cecil Reed was 36 years of age when he made proof,
8 about 4 years after entry; he was married, father of two minor children,
9 a veteran of two years service in the Navy, honorably discharged;
10 entered on May 25, 1957, cleared the land, lived on the land except for
11 recited absences because of employment; drilled a well, built a house;
12 cultivated 10 acres and planted same to rye in the 1959 crop year (fall
13 of 1958, spring of 1959; and see oral testimony of Reed, line 15, p. 102
14 Tr., through line 7, p. 103 Tr.), harvested none of the crop; cultivated
15 20 acres in the 1961 crop year, planted the acreage to oats, constructed
16 a dwelling in 1957; in 1960 contracted for a well and pump and in the
17 same year built a pump house, with material and labor costs set out in
18 the affidavits, supplying his own labor for a portion without assigning
19 value to it.

20 Reed swore that he had no actual knowledge of any statement
21 made by either of the witnesses in their testimony in connection with
22 his proof (Ex. K, Admin. File) and the Government-designated
23 testimonial officer--the Douglas County Assessor -- certified that the
24 entryman was examined separately and apart from witnesses in the case.

25 The sworn proof of the two witnesses affirms (Ex. K, Admin.
26 File), with some variation in values of improvements, and from personal

1 observation, the essential and material points of Reed's own proof.

2 The foregoing, we submit, constitutes all of the corroboration
3 required by statute, and all that was required in law, to qualify Reed
4 for his patent.

5 /Note: The Secretary's decision, curiously, at p. 5 (United
6 States v. Cecil Reed, A-30354, Sept. 29, 1965; Admin. File), in
7 footnote 2, contains this observation:

8 "It is rather remarkable that each of his witnesses, who
9 was supposed to testify separately and of his own knowledge
(43 CFR 1823.2-1, 1923.2-2), should make precisely the
10 same mistake."

11 The "mistake" is the distinction made between cultivating in the fall and
12 planting in the spring (see Tr. p. 107, lines 4-15), tied by the opinion
13 writer to apparent disbelief --notwithstanding the testimonial officer's
14 certificate -- that the witnesses did in fact testify separately.

15 Returning to judicial precedent: the court below, in adopting
16 language from Quock Ting v. United States, supra, overlooked quoting
17 language from the same decision truly and directly applicable to the
18 testimony of Reed's two statutory proof witnesses. Adopting language
19 from Kavanaugh v. Wilson, 70 N. Y. 177, ___ Atl. ___, the Supreme
20 Court in Quock Ting quoted with approval as follows:

21 "It is undoubtedly a general rule that when a disinterested
22 witness, who is in no way discredited, testifies to a fact
23 within his own knowledge, which is not of itself improbable,
24 or in conflict with other evidence, the witness is to be
25 believed, and the fact is to be taken as legally established,
26 so that it cannot be disregarded by court or jury."

27 And there is direct support for this position, in another United
28 States Supreme Court decision involving construction of the very statute
(R. S. 2291, now 43 U.S.C.A. 164) here so germane.

the Supreme Court was called upon, in connection with appeal from a perjury indictment, to determine, inter alia, whether a regulation purporting to add to the requirements of proof set out in R. S. 2291 could be, or had been "added to" by regulations of the Department of the Interior. The Court said (228 U. S. 14, at pps 19-22) of R. S. 2291.

It provided as follows: " * * * If * * * the person making such entry * * * proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for the term of five years * * * and makes affidavit, that no part of such land has been alienated * * * and that he, she, or they will bear true allegiance to the government of the United States; then, in such case, he, she, or they * * * shall be entitled to patent." It will be observed that the facts required to be proved are stated, by what means proved, and the manner of proof and its quantum. The facts to be proved are (1) cultivation of and residence upon the land and (2) nonalienation and allegiance; the means of proof of the first being two credible witnesses; of the second affidavit of the claimant. In other words, the section is not only explicit as to what is to be proved, but in what manner proved; and what is required of the claimant himself, to wit, an affidavit, is distinguished from what he must establish by others, to wit, two credible witnesses. Such, then, are the conditions seemingly legislatively made the exact measure of the obligation of the homestead claimant. It certainly will not be asserted that they can be detracted from. It is asserted that they may be added to, by "certain sections of the Revised Statutes. We insert the sections in the margin / note: the insertions include R. S. 2478, now 43 U. S. C. 1201, the section relied upon by Interior as authority for its regulations providing for contest actions. It will be seen that they confer administrative power only. This is certainly so as to * * * sec. 2478 * * *; and certainly, under the guise of regulation legislation cannot be exercised. U. S. v. United Verde Copper Co., 196 U. S. 207. Especial stress, however is put upon Sec. 2246 (U. S. Comp. Stat. 1901, p. 1371) / note: now found as 43 U. S. C. A. 75, * * *

Acting under the authority presumed to be given by sec. 2246 and the other sections, a regulation was promulgated which prescribed forms of taking pre-emption and final homestead proof by questions and answers, and provided that "the claimant will be required to testify, as a witness, in his own behalf, in the same manner." It was testimony

1 exacted in pursuance of this regulation and in the manner
2 directed by it which constitutes the charge of the indictment. It will be observed, therefore, that the claimant
3 was required to testify as other witnesses. In other words,
4 three witnesses were required; sec. 2291 requires two
5 only, and, as we have said, points out what proof, in addition,
6 the claimant himself shall give. It is manifest that the
7 regulation adds a requirement which that section does not, and
8 which is not justified by sec. 2246. To so construe the
9 latter section is to make it confer unbounded legislative powers.
10 What, indeed, is its limitation? If the Secretary of the
11 Interior may add by regulation one condition, may he not
12 add another? If he may require a witness or witnesses in
13 addition to what sec. 2291 note, now 43 U.S.C.A. 164
14 requires, why not other conditions, and the disposition of
15 the public lands thus be taken from the legislative branch of
16 the government and given to the discretion of the Land
17 Department? It is not an adequate answer to say that the
18 regulation must be reasonable. The power to make it is
19 expressed in general terms. If given at all, it is as
20 broad as its subject, and may vary with the occupant of
21 the office. This is to make conditions of title, not to
22 regulate those constituted by the statute. * * *

23 In U. S. v. Verde Copper Co., supra, this court considered
24 the power of the Secretary of the Interior * * *. We said:
25 "If (the regulation involved) is valid, the Secretary of
26 the Interior has the power to abridge or enlarge the
statute at will. If he can define one term, he can define
another. If he can abridge, he can enlarge. Such power
is not regulation; it is legislation."

* * * * *

18 Appellant submits this proposition: the Supreme Court
19 announced in U. S. V. George, supra, that the Department of the
20 Interior had no power to add to the requirements of the law that cultivation
21 and residence be proved by two credible witnesses. The law is
22 still on the books. It is still the case that " * * * the facts required to
23 be proved are stated, by what means proved, and the manner of proof and
24 its quantum."

25 We respectfully submit that the Secretary erred, as did the
26 lower court, in rejecting as fully corroborating evidence the

1 statutorily-required and defined evidence of official record and before
2 each in turn; that entryman Reed is entitled to patent to his full 100
3 acre entry.

4 /Note: It will be observed that counsel for appellant, in the
5 court below (R. 47) made an offer of proof " * * to which the same is
6 rejected on grounds that the evidence is limited to the Administrative
7 Record Lodged with the Clerk." This offer, while not set out in the
8 court minutes, was plaintiff's effort to preserve his right to produce
9 additional affidavits or direct testimony of the Reed proof witnesses, and
10 additional witnesses in support of what counsel had thought -- until the
11 Secretary's decision -- was already sufficient evidence of the entryman's
12 compliance.]

13 3. On the whole record, appellant-entryman is
14 entitled to have his final proof allowed, when
15 tested by "good faith" standards on both a legal
16 and an equitable basis.

17 Here, because so much of the administrative determination
18 pivoted around the point and because the lower court decision is silent
19 on it, appellant simply incorporates by reference argument in support
20 of this proposition contained in the record below. (R. 68-74). 43 U.S.
21 C.A. 162; 43 C.F.R. 166.18 (1961 ed.)

22 Brief reference will suffice. The source of the good faith
23 requirement is identified in Stewart v. Penny et al 238 F. Supp. 821.
24 at 829-831, the court below quoting with approval as "an appropriate
25 statement of the meaning of good faith" within the context of the
26 statute and code found in Carr v. Fife 44 F. 713 (CC Wash. 1891).

as follows:

"* * * whether he (the applicant) had actually, within the time limited by law, established his residence upon the land, with the intention of acquiring it for a home; whether he had continued to actually reside upon the land; whether he was really engaged in improving the land, or in good faith intending to do so; or whether he was only making a colorable pretense of residing upon and improving the land * * * and acquiring it for speculative purposes, without complying with the terms of the homestead law."

In Stewart the court also found that the homestead laws should be liberally applied in favor of the entryman, citing in support Ard v. Brandon, 156 U. S. 537 (1895) and Clements v. Warner 24 How. 394, 16 L. Ed. 695.

In the instant case, the government's lone witness in the contest hearing below, Mr. Hagihari, the land examiner, volunteered his opinion, as follows:

* * * * *

Q (by Mr. ABBOTT): How do you square this recommendation with your testimony this morning that there was no compliance with the cultivation entirely apart from the water?

A (by Mr. HAGIHARI): He had attempted to comply with some of the requirements, had shown good faith. * * *

Q: * * * Would you enlarge upon that? How is that weighed?

A: Good faith or intent that he is trying to comply with the regulations. In this case Mr. Reed had built a home on it. He had attempted to clear off 20 acres, and he established a home. (Tr. 57-58)

* * * * *

1 It is somewhat difficult to couple the foregoing with the court
2 declaration in Stewart, supra, "that the homestead laws should be
3 liberally applied in favor of the entryman * * * and is not a matter of
4 the whim or predisposition of the particular Secretary of the Interior
5 who graces the office." The Nevada Federal district court then joined
6 with approval from Ard v. Brandon, supra, this language:

7 "The law deals tenderly with one who, in good faith,
8 goes upon the public lands, with a view of making a
9 home thereon. * * *."

10 VI. CONCLUSION

11 Included in the Index to Exhibits is one identified as "Letter
12 dated March 12, 1962, addressed to President John F. Kennedy, signed
13 by Cecil R. Reed." (Ex. N: Tr. 13). Mr. Reed, asked Tr. 111 why
14 he wrote a letter to President Kennedy in 1962, replied:

15 * * * * *

16 "Well, I did have a little argument with the Bureau of
17 Land Management office, and I decided at that time that
18 I would fight this through to the limit, and I figured
19 I just as well start at the top and come down. * * *"

20 * * * * *

21 And so he did.

22 More than thirteen years after receipt on April 15, 1955 by the
23 Nevada Land office of his application for homestead entry (Ex. 108),
24 Mr. Reed may ponder his reasons for filing as expressed on the record
25 (Tr. 108):

26 * * * * *

27 Q. (Mr. ABBOTT): But when you went on the land,
28 why were you there ?

29 A. (Mr. REED): Because I believed that a man

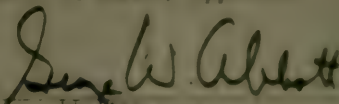
1 could make a living on a place like this, and I
2 loved this part of the country very much.
3

4 Appellant submits, on all of the files, records, and pleadings
5 in these proceedings and on the applicable legal and equitable principles
6 that the decision of the lower court should be reversed and this case
7 remanded below with appropriate instructions respecting issuance of
8 patent to appellant.

9 Dated this 30th day of August, 1968.

10 Respectfully submitted,

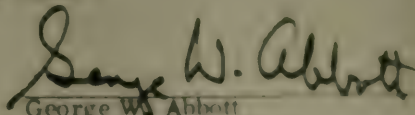
11 CECIL R. REED, Appellant

12 By 
13 his Attorney

14 George W. Abbott, Esq.
15 101 First National Bank Bldg.
Minden, Nevada 89423

16 CERTIFICATE

17 I certify that, in connection with the preparation of this brief,
18 I have examined Rules 18, 19 and 39 of the United States Court of
19 Appeals for the Ninth Circuit, and that, in my opinion, the foregoing
20 brief is in full compliance with those rules.

21 
22 George W. Abbott
23 Attorney for Appellant.
24
25
26

AFFIDAVIT OF SERVICE

STATE OF NEVADA)

: ss.

COUNTY OF DOUGLAS)

George W. Abbott, being first duly sworn, deposes and says: that on this 31st day of August, 1968, he served a copy of the Brief for the Appellant on counsel for the Appellees by mailing a copy thereof, postage prepaid to:


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Asst. Attorney General of Land and
Water Resources Division
Department of Justice
Washington, D. C. 20530

Frank B. Freidman
Department of Justice
Washington, D. C. 20530

A. Donald Mileur
Department of Justice
Washington, D. C. 20530


George W. Abbott

Subscribed and sworn to before me
this 30th day of August, 1968.


Howard E. McArthur
Notary Public
1004

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

Record No. 22,755

ROSALIE RIGGINS,

Appellant

v.

MARGARET K. RIGGINS, Executrix
of the Estate of LESLIE E. RIGGINS,
Deceased,

Appellee

**Appeal from the United States District Court
for the District of Nevada**

REPLY BRIEF OF APPELLANT

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IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

Record No. 22,755

ROSALIE RIGGINS,

Appellant

v.

MARGARET K. RIGGINS, Executrix
of the Estate of LESLIE E. RIGGINS,
Deceased,

Appellee

REPLY BRIEF OF APPELLANT

The appellee cites no federal case, which holds that federal jurisdiction is lacking if a State statute of limitations will reduce the claim below the jurisdictional amount. The cases in appellee's Brief are distinguishable on their facts and holdings, and each case in appellee's Brief will be discussed herein.

There are two federal cases expressly holding that the application of the statute of limitations will not impair federal jurisdiction, when the amount claimed in the Complaint exceeds the jurisdictional amount. These cases are *Griffin v. Smith*, 256 F. Supp. 746 (N.D. Okla. 1966), cited in appellant's

Brief at page 4, and *Upton v. McLaughlin*, 105 U.S. 640, 26 L.Ed. 1197 (1881).

The sole Nevada case relied upon by appellee, decided in 1900, discussed a statute differing in wording from the present statute. To assist the Court on appeal, each of the cases in appellee's Brief will be discussed according to the four (4) points listed in appellee's Brief. Each case will have the abbreviation "Br.—," indicating the page where the case is discussed in appellee's Brief.

Point One: In *North American Transportation and Trading Company v. Morrison*, 178 U.S. 262, 44 L.Ed. 1061 (1900) (Br. 6), there were eight causes of action for damages against a common carrier for breach of contract for failure to transport the plaintiff and seven other passengers to their destination in Dawson City from Seattle, Washington. There was no evidence in the record as to the citizenship of the seven passengers, who had assigned their claims to the plaintiff. The plaintiff claimed a number of items of damages, among which was the amount of wages or earnings he could have made in Dawson City, if the common carrier had fulfilled its contract. The Court held that the common carrier was not liable for such damages as a matter of law, which reduced the amount below the jurisdictional amount.

In *Vance v. Vandercook Co.*, 170 U.S. 468, 42 L.Ed. 1111 (1893) (Br. 6), which was a suit to recover possession of certain personal property, or its value, plus punitive damages, the Court held that under the law of South Carolina, consequential damages

cannot be recovered in an action of trover. The damages claimed, omitting the consequential damages, were less than the jurisdictional amount.

In *KVOS v. Associated Press*, 299 U.S. 269, 81 L.Ed. 183 (1936) (Br. 7), the Court held that the amount in controversy was the damage threatened to a business by the acts, and not the value of the business.

In *McNutt v. General Motors Acceptance Corp.*, 298 U.S. 178, 80 L.Ed. 1135 (1935) (Br. 7), which was a suit to enjoin the enforcement of an Indiana statute subjecting a business to regulations, the Court held that the amount in controversy was the value of the right to be free from regulation. There was no allegation that the regulation would curtail business and cause a loss.

In *North Pacific S.S. Lines v. Soley*, 257 U.S. 216, 66 L.Ed. 203 (1921) (Br. 7), which was a suit to enjoin the execution of an award under a California compensation act, the total liability due the injured party was less than the jurisdictional amount.

In *Gray v. Occidental Life Co.*, 387 F. 2d 935 (CCA 3rd 1967) (Br. 7), which was an action under disability policy, the Court held that the claim for punitive damages was frivolous as only Two Thousand Two Hundred Forty-two Dollars (\$2,242.00) had accrued in damages at the time of the filing of the Complaint.

In *Spires v. North American Acceptance Corp.*, 383 F.2d 745 (CCA 5th, 1967) (Br. 7), the Court held

that under South Carolina law, the Complaint stated no cause of action for punitive damages.

In *Ringsby Truck Lines v. Beardsley*, 331 F.2d 14 (CCA 8th, 1964) (Br. 7), the Court held that under Colorado law, punitive damages cannot be recovered for rescission of a fraudulently induced transaction.

In *Batter v. Williams*, 316 F.2d 540 (CCA 5th, 1963) (Br. 8), an attorney alleged that he was due Five Thousand Two Hundred Eighty Dollars (\$5,280.00) for services rendered, and an additional sum of Ten Thousand Dollars (\$10,000.00) if he had not been discharged. The Court held that under Florida law, an attorney who is discharged by a client can only recover for services actually rendered.

In *White v. North American Accident Co.*, 316 F.2d 5 (CCA 10th, 1963) (Br. 8), the sum of Six Thousand Dollars (\$6,000.00) only was involved under a health and accident insurance policy.

In *Turner v. Wilson Lines*, 242 F.2d 414 (CCA 1st, 1957) (Br. 8), there was no diversity of citizenship. An employee of a salvaging company died from injuries on a ship being salvaged in a Massachusetts harbor. Before his death, he suffered pain lasting eight (8) hours of moderate duration. The Court held that the District Court did not abuse its findings that the pain was not worth Three Thousand Dollars (\$3,000.00).

In *Giordano v. Radio Corp. of America*, 183 F.2d 558, (CCA 3rd, 1950) (Br. 8), which was a suit to enjoin an employer from proceeding further on the

charges in a decision of expulsion from the Union, there was no proof that the plaintiff, if expelled from the local union, would lose Three Thousand Dollars (\$3,000.00).

In *Hughes v. Encyclopedia Brit.*, 199 F.2d 295 (CCA 7th, 1952) (Br. 8), which was an action by former employees against an employer for benefits under a pension plan, the Court held not a true class action, as the claim of no individual exceeded Three Thousand Dollars (\$3,000.00).

In *Odell v. Humble Oil Co.*, 201 F.2d 123, (CCA 10th, 1953) (Br. 8), which was an action by some discharged employees against an employer for wrongful discharge, the Court held that the recovery of each employee was less than Three Thousand Dollars (\$3,000.00).

In *Parmelee v. Ackerman*, 252 F.2d 721, (CCA 6th, 1958), (Br. 8), the Court held that under Ohio law, damages for emotional distress for breach of contract cannot be recovered.

In *Nixon v. Loyal Order of Moose*, 285 F.2d 250, (CCA 4th, 1960) (Br. 8), which was an action by an architect for his fee, the architect had sent a statement that the sum of Two Thousand Nine Hundred Sixty Dollars (\$2,960.00) was due.

In *McKoy, Inc. v. Schonwald*, 341 F.2d 737, (CCA 10th, 1965), (Br. 8), which was a suit to quiet title, the District Court heard evidence and found that mineral interests were worth Fifty Dollars (\$50.00) per acre for a twenty-acre tract.

In *Herrick v. Sayler*, 245 F.2d 171 (CCA 7th, 1957) (Br. 9), the Court held that under Indiana law, damages for wrongful death are limited to medical, hospital and funeral expenses plus One Thousand Dollars (\$1,000.00).

In *F. & S. Const. Co. v. Jensen*, 337 F.2d 160, (CCA 10th, 1964) (Br. 9), the District Court found that the plaintiff's allegation in the Complaint of the amount in controversy was not made in good faith. It awarded damages of Five Thousand Dollars (\$5,000.-00) to each plaintiff, who had purchased homes from the vendors and sued the vendors for damages. The cost price of each house was slightly in excess of Ten Thousands Dollars (\$10,000.00).

In *Quinault Tribe of Indians v. Gallagher*, 368 F.2d 648, (CCA 9th, 1966) (Br. 10), the complaint alleged no amount in controversy. The Court held that the tribe of Indians could not claim as damages the value of law enforcement.

In *Southern Pacific Co. v. McAdoo*, 82 F.2d 121 (CCA 9th, 1936) (Br. 10), a removal case, the plaintiff alleged that the bond in controversy, which the Court was asked to construe, had a par value of One Thousand Dollars (\$1,000.00).

In *Yoder v. Assiniboine and Sioux Tribes*, 339 F.2d 360, (CCA 9th, 1964) (Br. 10), the Court held that the matter in controversy was the right to be free from a regulation of a Montana commission.

In *Electro Therapy Prod. v. Strong*, 84 F.2d 766 (CCA 9th, 1936) (Br. 10), there was no proof that

the patents exceeded Three Thousand Dollars (\$3,000.00) in value.

In *Canadian Indemnity Co. v. Republic Co.*, 222 F.2d 601, (CCA 9th, 1955) (Br. 10), which was a suit to construe an automobile liability policy, the Complaint alleged that a motorcycle was damaged, but did not allege anyone had been injured.

In *Commercial Casualty Co. v. Fowles*, 154 F.2d 884 (CCA 9th, 1946) (Br. 10), which was a suit to construe the rights of the parties under an accident policy, the Court held that future benefits under the policy could not be considered in determining the amount in controversy.

In *City of Forsyth v. Mt. States Power*, 127 F.2d 583 (CCA 9th, 1942) (Br. 11), which was an action for injunctive relief, there was no allegation showing the value of the rights.

Point Two: In *Jones v. Powning*, 25 Nev. 399, 60 P. 833 (1900) (Br. 11), the statute read: "No claim shall be allowed by the executor or administrator or the district judge which is barred by the statute of limitations at the time of the death of the person whose death is being administered." The Court held that the Amended Complaint showed on its face that the cause of action accrued more than six (6) years before the death of decedent.

In *Reay v. Heazelton*, 60 P. 977 (1900) (Br. 11), a judgment was entered in 1886 against a person who died in 1892. The action was filed in 1894. The California statute of limitations is not stated verbatim in the opinion.

In *Fontana Land Co. v. Laughlin*, 250 P. 669 (Cal. S.Ct. 1926) (Br. 12), the statute read: "No claim must be allowed by the executor or administrator, or by a judge of the superior court, which is barred by the statute of limitations."

In *Bryant v. Superior Ct.*, 61 P.2d 483 (DCA 1936) (Br. 12), an order was entered by the Trial Court vacating certain orders which had approved a claim against the estate made more than two years prior to the vacating order. A petition was filed to annul the vacating order, and a Demurrer to said petition was sustained.

In *Hurlimann v. Bank of America*, 297 P.2d 682 (DCA Cal. 1956) (Br. 12), the statute required all claims for damages for physical injuries must be filed or presented to the estate within the time limited in the notice to creditors. The Court held that the statute included a cause of action for an injured person, who had not discovered the tort.

In *Barclay v. Blackington*, 59 P. 834 (Cal. S.Ct. 1899) (Br. 12), there was a four-year statute of limitations, and suit was filed on a note more than four years after the note became due.

In *In re Smith's Estate*, 264 P.2d 638 (DCA Cal. 1953) (Br. 12), the notice of the estate required claims by creditors to be presented not later than a designated time and the disputed claim was filed more than six months later.

In *In re Cocanougher's Estate*, 375 P.2d 1014 (Mont. S.Ct. 1962) (Br. 12), a suit was filed against

the Executors of an estate to account for the proceeds from the sale of cattle sold by decedent fourteen years subsequent to the death of plaintiff's decedent.

In *Ricker v. Ricker*, 270 P.2d 150 (1954) (Br. 13), there was a six-year statute of limitations. The loan was made in 1919 payable on demand. Five years later, there was an oral agreement that the borrower could pay whenever he got on his feet. The claim was presented in 1953.

In *Ellis v. Cauhaupé*, 260 P.2d 309 (1953) (Br. 14), there was a ten-year statute of limitations. The written contract accrued in 1937, but the action was filed in 1951.

In *Blas v. Talabera*, 318 F.2d 617 (CCA 9th, 1963) (Br. 14), the buyers sued the seller for specific performance of a contract to convey land. The contract was destroyed during World War II. The buyer was in possession and claimed he paid the purchase price. The Court held that the statute of limitations did not apply, as there was no proof of the date on which the statute of limitations began to run.

Point Three: All of the cases cited in appellee's Brief under Point Three are also cited in Point One and will not be repeated.

Point Four: In *Mitchell v. Maurer*, 293 U.S. 237, 79 L.Ed. 338 (1934) (Br. 18), there was no diversity of citizenship.

In *Page v. Wright*, 116 F.2d 449 (CCA 7th, 1940) (Br. 18), the Court held that defendant was

entitled to file an amended answer challenging diversity of citizenship.

In *Carr v. Beverly Hills Corporation*, 237 F.2d 323, (CCA 9th, 1956) (Br. 18), there was no diversity of citizenship.

In *Royalty Service Corp. v. Los Angeles*, 98 F.2d 551, (CCA 9th, 1938) (Br. 18), which was a suit to enjoin the enforcement of a tax statute, the Court held that the amount in controversy was the amount of tax due from the plaintiff.

In *Minnis v. Southern Pac. Co.*, 98 F.2d 913, (CCA 9th, 1938) (Br. 18), there was no diversity of citizenship.

In *Kaufman v. Liberty Ins. Co.*, 245 F.2d 918, (CCA 3rd, 1957) (Br. 18), the record in the lower Court did not establish that the amount claimed exceeded Three Thousand Dollars (\$3,000.00) in a declaratory judgment action to construe a liability policy.

In *Armstrong v. New La Paz Gold Mining Co.*, 107 F.2d 453, (CCA 9th, 1939) (Br. 20), the Court sustained jurisdiction, even though judgment was for an amount less than the jurisdictional amount.

In *Kissick Construction Co. v. First National Bank*, 46 F. Supp. 869 (Br. 20), jurisdiction was maintained although dismissal of the second cause of action placed the remaining balance less than the jurisdictional amount.

In *Griffin v. Smith*, 256 F. Supp. 746 (Br. 21), the facts are almost identical to the facts in the present case. The complaint was based on arrearage in support under a foreign judgment. Defendant's motion to dismiss, based upon the statute of limitations, claimed that the balance would be less than the jurisdictional amount of Ten Thousand Dollars (\$10,000.00), if the statute of limitations was upheld. The Court rejected the motion to dismiss. The quotation from the case is found at page 4 of appellant's Brief.

In *Anderson-Thompson, Inc. v. Logan Grain Co.*, 238 F.2d 598 (CCA 10th, 1956) (Br. 21), the judgment was for an amount less than the jurisdictional amount, but the Court held that it had jurisdiction.

In *Faias v. Superior Ct.*, 133 Cal. App. 525, 24 P.2d 567 (1933) (Br. 22), the holding of the Court was that the statute prohibiting the waiver of the statute of limitations by an executor, administrator, or Superior Court Judge, did not apply where some part of the claim was not barred by the statute of limitations. This holding would indicate that the application of the statute of limitations prohibiting a waiver is not automatic, nor is it applicable to every case. At 24 P.2d 568, the Court said:

"The statute provides that no claim which is barred by the statute shall be allowed or approved (Probate Code Sec. 708); but it is not contended here that the whole claim was barred, as a portion at least had accrued within five years immediately preceding decedent's death; and when the Superior Court sitting in matters of probate has jurisdiction of the subject-matter

of a case, it has the power to hear and determine in the mode provided by law all questions of law and fact the determination of which is ancillary to a proper judgment (*Burris v. Kennedy*, 108 Cal. 331, 41 P.458), and although the allowance of a claim may be erroneous (*Estate of Aldersley*, 174 Cal. 366, 163 P. 206). The question is one which the Court is empowered to decide, and its jurisdiction is not limited to the rendition of a correct decision."

In *Re Lucas*, 144 P.2d 340 (Cal. S.Ct., 1943) (Br. 23), the California Court again held that the statute prohibiting an administrator, executor, or Superior Court Judge, to waive the statute of limitations does not apply, where there was some doubt as to whether the statute of limitations applied, and where litigation would be required to determine the applicability of the statute of limitations, the Court holding that a public administrator acting in good faith could compromise the action.

In *Lewis v. Neblett*, 311 P.2d 489 (Cal. S.Ct., 1957) (Br. 23), the Court based its decision that the California statute of limitations did not apply on two grounds, to-wit: (1) that the administrator had extended the time in writing for the trial to commence; (2) that the plaintiff was unable to read or write, or figure, and relied on decedent for advice, and that discovery of the defraud of decedent did not occur until some time before the running of the statute of limitations.

Some of the cases cited in appellee's Brief favor the appellant, rather than the appellee.

In *Jaconski v. Avisun*, 359 F.2d 931, (CCA 3rd, 1966) (Br. 9), the District Court dismissed the action for personal injuries on the ground that the amount in controversy did not exceed Ten Thousand Dollars (\$10,000.00). Although the special damages did not exceed Four Hundred Dollars (\$400.00), the Court of Appeals reversed.

In *Food Fair Stores v. Food Fair*, 177 F.2d 177 (CCA 1st 1959) (Br. 10), which was a suit to enjoin the use of the words "Food Fair," the Court held that the amount in controversy exceeded the jurisdictional amount of Three Thousand Dollars (\$3,000.00), as the plaintiff could show damages in excess of that amount.

In *Santiesteban v. Goodyear Tire Co.*, 306 F.2d 9, (CCA 5th, 1962) (Br. 10), the District Court dismissed the case that sought damages for invasion of privacy for lack of jurisdictional amount. The defendant had removed tires from the rims of plaintiff's car from the lot of a country club where he worked. The Court of Appeals reversed the District Court, holding that punitive damages could be recovered by the plaintiff.

In *Davenport v. Mutual Benefit*, 325 F.2d 785 (1963) (Br. 10, 15), which was an action for compensatory and punitive damages for fraud and deceit under Oregon law, the District Court dismissed the case for lack of jurisdiction, and this Court on appeal reversed, holding at page 787, to-wit:

"Here the judge dismissed because in his opinion it appeared from the proof that the

plaintiff was not entitled to recover the jurisdictional amount. In such a case, where the complaint asserts a claim in the jurisdictional amount, the action should not be dismissed unless the proof not only shows that the plaintiff cannot recover that amount, but also shows this with such certainty as to indicate a lack of good faith on the part of the plaintiff in bringing the action in the federal court. *St. Paul Mercury Indemnity Co. v. Red Cab Co.* (1938) 303 U.S. 283, 289, 58 S.Ct. 586, 82 L.Ed. 845; *McDonald v. Patton*, 4th Cir., 240 F.2d 424, 426; *Matthiesen v. Northwestern Mutual Insurance Company*, 5 Cir. 1961, 286 F.2d 775."

In *McDonald v. Patton*, 240 F.2d 424 (CCA 4th, 1957) (Br. 9, 15), the District Court dismissed the case for lack of jurisdiction as to the amount in controversy. The Court of Appeals, construing North Carolina law, reversed. In a lucid opinion as to the amount in controversy, Judge Sobeloff, wrote:

"It is the firmly established general rule of the federal courts that the plaintiff's claim is the measure of the amount in controversy and determines the question of jurisdiction; and it is indisputably the law that if the ultimate recovery is for less than the amount claimed, this is immaterial on the question of jurisdiction. *Scott v. Donald*, 165 U.S. 58, 17 S.Ct. 265, 41 L.Ed. 632. From early days, the broad sweep of the rule has been subject to a qualification namely, that the plaintiff's claim must appear to be made in good faith. *Bowman v. Chicago &*

Northwestern Railway Co., 115 U.S. 611, 6 S.Ct. 192, 29 L.Ed. 502, *Schunk v. Moline, Milburn & Stoddart Co.*, 147 U.S. 500, 505, 13 S.Ct. 416, 37 L.Ed. 255. Where it is plain that there is a mere pretense as to the amount in dispute, the amount of the claim will not avail to create jurisdiction, but where the plaintiff makes his claim in obvious good faith, it is sufficient for jurisdictional purposes; and this is so even where it is apparent on the face of the claim that the defendant has a valid defense. *Upton v. McLaughlin*, 105 U.S. 640, 26 L.Ed. 1197; *Schunk v. Moline, Milburn & Stoddart Co.*, supra; *Smithers v. Smith*, 204 U.S. 632, 27 S.Ct. 297, 51 L.Ed. 656. In the last cited case, the Supreme Court said, 204 U.S. at page 644, 27 S.Ct. at page 300, that when a plaintiff in good faith asserts a claim in an amount within the jurisdiction of the Court, the Judge is forbidden 'to interpose and try a sufficient part of the controversy between the parties to satisfy himself that the plaintiff ought to recover less than the jurisdictional amount, and to conclude, therefore, that the real controversy between the parties is concerning a subject of less than the jurisdictional value.' "

"In applying this test, it has been further recognized that while good faith is a salient factor, it alone does not control; for if it appears to a legal certainty that the plaintiff cannot recover the jurisdictional amount, the case will be dismissed for want of jurisdiction. Such is the doctrine laid down in *St. Paul Mercury*

Indemnity Co. v. Red Cab Co., 303 U.S. 283, 289, 58 S.Ct. 586, 82 L.Ed. 845. However, the legal impossibility of recovery must be so certain as virtually to negative the plaintiff's good faith in asserting the claim. If the right of recovery is uncertain, the doubt should be resolved, for jurisdictional purposes, in favor of the subjective good faith of the plaintiff."

"In certain of the older cases, a somewhat different statement of the rule is found. It was formerly said that 'if, from the nature of the case as stated in the pleadings, there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach.' Vance v. W. A. Vandercook Co., 170 U.S. 468, 18 S.Ct. 645, 647, 42 L.Ed. 1111. The possible difference between the two formulations was the subject of some discussion in Calhoun v. Kentucky-West Virginia Gas Co., 6 Cir., 166 F.2d 530, but the difference may be more apparent than real. Cf. Scott v. Donald, supra, 165 U.S. at page 89, 17 S.Ct. 265, and Barry v. Edmunds, 116 U.S. 550, 559, 6 S.Ct. 501, 29 L.Ed. 729. However this may be, if the older version was different, it yields to the one more recently declared in the St. Paul-Mercury case."

In *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 6 L.Ed.2d 890 (1961) (Br. 9), also cited at page 3 of appellant's Brief, the District Court dismissed the Complaint for lack of jurisdictional amount. The Court of Appeals reversed, holding that the District Court did have jurisdiction, and the Supreme Court

affirmed. An injured employee was awarded the sum of One Thousand Fifty Dollars (\$1,050.00) from a Texas compensation commission. The compensation carrier filed a Complaint in Federal Court alleging the amount of the award and also alleging that the injured party was claiming the sum of Fourteen Thousand Thirty-five Dollars (\$14,035.00), and prayed that no amount should be awarded. The injured employee filed a compulsory counterclaim for the sum of Fourteen Thousand Thirty-five Dollars (\$14,035.00).

In *St. Paul Mercury, Inc. v. Red Cab Co.*, 303 U.S. 283, 58 S.Ct. 586, 82 L.Ed. 845 (1937) (Br. 9), from which this Court in *Armstrong v. New La Paz Gold Mining Co.*, 107 F.2d 453, 455 (1939), quoted with approval, an insured sued an insurer for breach of contract in State Court, and the case was reversed. The District Court awarded judgment of Eleven Hundred Sixty-two and 98/100 Dollars (\$1,162.98). The Court of Appeals reversed for lack of jurisdictional amount. The Supreme Court, in holding that the District Court had jurisdiction, stated at 303 U.S. 288, "... The inability of plaintiff to recover an amount adequate to give the Court jurisdiction does not show his bad faith or oust the jurisdiction. Nor does the fact that the complaint discloses the existence of a valid defense to the claim."

In *Smithers v. Smith*, 204 U.S. 632, 27 S.Ct. 297, 51 L.Ed. 656 (1907) (Br. 9), also found at page 4 of appellant's Brief, in holding that the District Court had jurisdiction in an action for damages for ouster of the plaintiff from possession of the land and for

recovery of the land, the Court relied upon the case of *Schunk v. Moline Co.*, 147 U.S. 500, 504, 13 S.Ct. 416, 37 L.Ed. 255 (1893), where the Court said:

“Suppose an action were brought on a non-negotiable note for \$2500, the consideration for which was fully stated in the petition, and which was a sale of lottery tickets, or any other matter distinctly prohibited by statute, can there be a doubt that the Circuit Court would have jurisdiction. There would be presented a claim to recover the \$2500, and whether that claim was sustainable or not, that would be the real sum in dispute. In short, the fact of a valid defense to a cause of action, although apparent on the face of the petition, does not diminish the amount that is claimed, nor determine what is the matter in dispute; for who can say in advance that that defense will be presented by the defendant, or, if presented, sustained by the Court?”

At 147 U.S. 505, the Court discussed and relied upon the case of *Upton v. McLaughlin*, 105 U.S. 640, 644, 26 L.Ed. 1197 (1881), which held that the defense of the statute of limitations does not oust the District Court from jurisdiction, to-wit:

“... A case much in point is that of *Upton v. McLaughlin*, 105 U.S. 640, 644. That was a suit brought by an assignee in bankruptcy more than two years after the cause of action accrued, and it was claimed that the trial court had no jurisdiction—because of a provision of

section 5057 of the Revised Statutes of the United States, that 'no suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee.' But it was held that the court did have jurisdiction, and this, notwithstanding sections 55 and 57 of the Code of Civil Procedure of Wyoming, the Territory in which that litigation took place, authorized a defendant to demur to the petition when it appeared upon its face either that the court had no jurisdiction or that the petition did not state facts sufficient to constitute a cause of action, and also provided that these objections were not waived by not taking them by either demurrer or answer. Speaking for the Court, Mr. Justice Blatchford said: 'It is contended that a petition which shows upon its face that the cause of action is barred by a statute of limitation, is a petition which does not state facts sufficient to constitute a cause of action; and that that objection, though not taken by demurrer or answer, may be taken at any time. But we are of opinion that the statutory provisions referred to cannot properly be construed as allowing the defence of a bar by a statute of limitation to be raised for the first time in an appellate court, even though the petition might have been demurred to as showing on its face that the cause of action is so

barred, and thus as not stating facts sufficient to constitute a cause of action.' In other words, it was held that although there was a perfect defence apparent upon the face of the petition, yet the court had jurisdiction—i.e., the right to hear and determine; and further, in that case, that the defence was not available when suggested for the first time in the appellate court. So, here, the Circuit Court had jurisdiction, because the amount claimed was over two thousand dollars; and although it appeared upon face of the petition that a part of the claim was not yet due, still the court had jurisdiction—the right to hear and determine whether this matter constituted a good defence to any part of the amount claimed."

CONCLUSION

It is respectfully submitted that the cases cited in appellee's Brief fail to sustain the holding of the District Court that jurisdiction was lacking by reason of the availability of a defense of the Nevada statute of limitations.

ROSALIE RIGGINS

By BRIAN L. HALL and
HOWARD I. LEGUM,
Attorneys for Appellant

JUL 1903

IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

Record No. 22,755

ROSALIE RIGGINS,

Appellant

v.
MARGARET K. RIGGINS, Executrix
of the Estate of LESLIE E. RIGGINS,
Deceased,

Appellee

APPELLANT'S BRIEF

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IN THE
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Appellee

APPELLANT'S BRIEF

STATEMENT AS TO JURISDICTION

The Complaint filed in the District Court alleged in paragraph 1 that the plaintiff was a citizen of the State of Virginia, and the defendant was a citizen of the State of Nevada, and that the amount in controversy exceeded, exclusive of interest and costs, the sum of Ten Thousand Dollars (\$10,000.00). The Answer admitted paragraph 1 of the Complaint, which was limited to jurisdiction.

The Complaint alleged that defendant's decedent at the time of his death was indebted to the plaintiff in

the amount of Thirty Thousand Seven Hundred Fifty Dollars (\$30,750.00), representing unpaid alimony under a Decree of the Circuit Court of the City of Norfolk, Virginia, entered on July 12, 1947, and demanded judgment for such sum.

The District Court has jurisdiction under 28 U.S.C.A., Section 1332(a). This Court has jurisdiction to review the judgment in question under 28 U.S.C.A., Section 1294, Section 2107, Rule 73(a) Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

The question involved on appeal is whether the District Court erred in dismissing the Complaint on the ground that the amount in controversy did not exceed Ten Thousand Dollars (\$10,000.00), exclusive of interest and costs. The question was raised by defendant in a Motion to Dismiss after the plaintiff filed a Motion for Summary Judgment.

SPECIFICATION OF ERROR

Appellant relies upon the following specification of errors:

1. The Court erred in dismissing the Complaint on the ground that the amount in controversy did not exceed the amount of Ten Thousand Dollars (\$10,000.-00), exclusive of interest and costs.

2. The Court erred in construing the Nevada statute of limitations, N.R.S. 147.090, as the basis of the jurisdictional amount to be lacking.

ARGUMENT

- I. THE AMOUNT IN CONTROVERSY IS DETERMINED FROM THE FACE OF THE COMPLAINT, IRRESPECTIVE OF A VALID DEFENSE APPARENT ON THE FACE OF THE COMPLAINT.

This Court, in *Armstrong v. New La Paz Gold Mining Co.*, 107 F.2d 453, 455 (1939), said:

"The Supreme Court in *St. Paul Mercury Inc. Co. v. Red Cab Co.*, 303 U.S. 283, 289, 58 S.Ct. 586, 590, 82 L.Ed. 845, gives the rule governing dismissal for want of jurisdiction in cases brought in the Federal Court, as follows " * * * the sum claimed by the plaintiff controls if the claim is apparently made in good faith. It must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. The inability of plaintiff to recover an amount adequate to give the Court jurisdiction does not show his bad faith or oust the jurisdiction. * * * "

In *Horton v. Liberty Mut. Ins. Co.*, 367 U.S. 348, 352, 81 S.Ct. 1570, 6 L.Ed.2d 890 (1961), the Court said:

"We agree with petitioner that determination of the value of the matter in controversy for purposes of federal jurisdiction is a federal question to be decided under federal standards.
...

"The general federal rule has long been to decide what the amount in controversy is from

the complaint itself, unless it appears or is in some way shown that the amount stated in the complaint is not claimed 'in good faith.' In deciding this question of good faith we have said that 'it' must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal."

In *Smithers v. Smith*, 204 U.S. 632, 642, 27 S.Ct. 297, 51 L.Ed. 656 (1907), the Court said:

"The rule that the plaintiff's allegations of value govern in determining the jurisdiction, except when upon the face of his own pleadings it is not legally possible for him to recover the jurisdictional amount, controls even where the declarations show that a perfect defense might be interposed to a sufficient amount of the claim to reduce it below the jurisdictional amount."

In *Griffin v. Smith*, 256 F. Supp. 746 (N.D. Okla. 1966), the defendant moved to dismiss an action to recover on a foreign judgment for child support on the ground of lack of the jurisdictional amount. In overruling the motion to dismiss, the Court said:

"The fact that a cause of action might be barred by statute of limitations does not remove jurisdiction from federal court to hear action if jurisdictional amount was sued for and would be due and owing but for defense of statute of limitations, and if statute of limitations reduces amount sued for to amount lower than jurisdictional minimum, court has jurisdiction to adjudicate rest of claim."

In *Kissick Const. Co. v. First Nat. Bank of Wahoo*, 46 F. Supp. 869, 871 (D. Nebr. 1942), in holding that the Court still retained jurisdiction to entertain the remaining cause of action aggregating less than the jurisdictional amount after dismissing one cause of action under the statute of limitations, the Court said:

"In cases where jurisdiction is derived from diversity of citizenship coupled with a controversy involving a statutory minimum amount, it is the sum actually claimed in good faith by the plaintiff when he files his complaint which determines the jurisdiction of the court and the fact that the plaintiff may not succeed in recovering all that he seeks in good faith will not affect the jurisdiction of the Court. *Upton v. McLaughlin*, 105 U.S. 640, 26 L.Ed. 1197; *Schunk v. Moline, etc., Co.*, 147 U.S. 500, 13 S.Ct. 416, 37 L.Ed. 255; *Smithers v. Smith*, 204 U.S. 632, 27 S.Ct. 297, 51 L.Ed. 656."

In *Anderson-Thompson, Inc. v. Logan Grain Company*, 238 F.2d 598, 601 (10 Cir. 1956), the Court said:

"In the absence of bad faith or collusion, jurisdiction attaches at the moment of the filing of the complaint and the existence of a good defense . . . will not defeat jurisdiction previously acquired."

The text books uniformly support the position of appellant that the District Court had jurisdiction in this case, to-wit:

1. In 1 Moore's Federal Practice, Section 0.92(1), pages 836, 837, the author states:

"The fact that there is an apparently valid defense to all or a part of the amount claimed will not destroy federal jurisdiction over the claim. For example, the fact that a cause of action might be barred by a statute of limitations does not remove jurisdiction from the federal court to hear the action. Nor does a defense of the statute of limitations to all or part of the value of the amount claimed affect the jurisdictional basis of this amount in controversy. A defense to the amount claimed might not be raised in the trial on the merits, and even if raised may be shown to be invalid. And a court should not confuse the determination of its jurisdiction with an adjudication on the merits of the validity of the amount claimed. Even if part of the claim is dismissed by summary judgment on the issue of statute of limitations, thereby reducing the remainder to an amount lower than the jurisdictional minimum, the Court still has jurisdiction to adjudicate the rest of the claim."

2. In 1 Barron and Holtzoff, Section 24, page 60, 1967 Pocket Part, it is said:

"In a related principle, if more than Ten Thousand Dollars (\$10,000.00) is claimed in the complaint, jurisdiction exists even though a defense to all or part of the claim may appear on the face of the complaint."

3. In 1 Barron and Holtzoff, Section 24, page 56, 1967 Pocket Part, it is said:

"In an interesting recent case, a compensation insurer sued in federal court to set aside an award of One Thousand Fifty Dollars (\$1,050.00) by the state compensation board, but alleged in the complaint that the employee had claimed Fourteen Thousand Thirty-five Dollars (\$14,035.00) before the board. The Supreme Court held that the requisite amount was in controversy since the court, reviewing de novo, might award anything up to the amount the employee had claimed before the board." (Citing *Horton v. Liberty Mut. Ins. Co.*, 1961, 81 S.Ct. 1570, 367 U.S. 348, 6 L.Ed.2d 890.

4. In 35A C.J.S. Federal Civil Procedure, Section 274, page 409, it is said:

"Where the allegations state a cause of action for an amount within the jurisdiction of the court, the fact that a valid defense to the cause is apparent on the face of the complaint does not render it insufficient to invoke jurisdiction or diminish the amount that is claimed in good faith."

5. In 32 Am. Jur. 2d Federal Practice and Procedure, Section 164, page 607, it is said:

"Whether or not the sum or value of the matter in controversy is sufficient to confer jurisdiction on a federal court is generally determined from the face of the complaint, irrespective of

the defendant's pleadings, or of defenses that may exist to the cause of action. The fact of a valid defense, although apparent on the face of the complaint, does not diminish the amount that is claimed nor determine what is the matter in dispute. Nor does it show bad faith on the part of the plaintiff in the amount that he claims or oust the jurisdiction of the federal court for lack of the requisite jurisdictional amount."

6. In 47 A.L.R.2d 651, 657, it is said:

"The fact that plaintiff's declaration, in setting forth a claim for damages within the jurisdiction of the United States court, discloses that there is available to the defendant a defense which will have the effect of wholly or partially defeating the claim so as to reduce it below the necessary figure, has been held not to affect the court's jurisdiction."

II. CALIFORNIA CASES RELIED UPON BY THE DISTRICT COURT DO NOT SUPPORT THE MOTION TO DISMISS FOR LACK OF JURISDICTION.

It appears that California makes a distinction between a debt completely barred by the statute of limitations and a debt partially barred by the statute of limitations, in construing the statute prohibiting an Administrator or Executor from waiving the bar of the statute of limitations. This was expressly held in *Faias v. Superior Court*, 133 Cal. App. 525, 24 P. 2d 567 (1933). Also, the cases of *Re Lucas*, 23 Cal. 2d 454, 144 P. 2d 340 (1943), and *Lewis v. Neblett*, 311

P. 2d 489 (1957), indicate that the application of the statute of limitations is not automatic.

III. APPELLEE IS BOUND BY PARAGRAPH 1 OF HER ANSWER ADMITTING THE ALLEGATIONS OF PARAGRAPH 1 OF THE COMPLAINT THAT THE AMOUNT IN CONTROVERSY EXCEEDS THE SUM OF TEN THOUSAND DOLLARS (\$10,000.00), EXCLUSIVE OF INTEREST AND COSTS.

This Court, it is submitted, should hold that the appellee is bound by her admission in her answer that the amount in controversy exceeds the jurisdictional amount.

CONCLUSION

It is respectfully submitted that the District Court erred in dismissing the Complaint.

ROSALIE RIGGINS

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In The
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Record No. 22755

ROSALIE RIGGINS,

Appellant

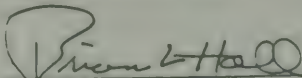
v.

MARGARETT K. RIGGINS, Executrix
of the Estate of LESLIE E. RIGGINS,
Deceased,

Appellee

CERTIFICATE

I, Brian L. Hall, certify that, in connection with the preparation of Appellant's Brief, I have examined Rules 18, 19 and 39 for the United States Court of Appeals for the Ninth Circuit, and that in my opinion, the foregoing Brief is in full compliance with those Rules.


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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

* * * * *

ROSALIE RIGGINS,

Appellant,

vs

MARGARETT K. RIGGINS, Executrix
of the Estate of LESLIE E. RIGGINS,
Deceased,

Appellee.

No. 22755

APPEAL FROM
DISTRICT COURT,
DISTRICT OF NEVADA

APPELLEE'S BRIEF

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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

* * * * *

ROSALIE RIGGINS,)	No. 22755
)	
Appellant,)	
)	
v)	
)	
MARGARETT K. RIGGINS, Executrix)	
of the Estate of LESLIE E. RIGGINS,)	
Deceased,)	
)	
Appellee.)	
)	
)	
)	

APPELLEE'S BRIEF

APPELLEE'S STATEMENT OF THE CASE

Appellant filed her complaint (record p. 1) against the Executrix of the Estate of her former husband on a rejected claim for \$30,750.00 unpaid alimony accrued under a judgment for separate maintenance entered on July 12, 1947 by the Circuit Court of Norfolk, Virginia, which required support

at the rate of \$150.00 per month. The judgment debtor died on August 30, 1964, without having made any payments.

Both parties concede the applicability of the Nevada statutes governing limitations of action (record p.88), and after the statute NRS 11.190 (Appendix page 1) which limited the instalments to six years, was asserted by appellee, appellant in her brief reduced her demand to \$10,800.00 (record p. 54, line 14).

Appellee then moved to dismiss for lack of jurisdiction (record p. 67), claiming that the alimony obligation terminated on the death of the judgment debtor, and that the only unbarred instalments accrued between February 8, 1961 and August 30, 1964. These totalled 31 instalments, which at \$150.00 each, aggregated only \$6,450.00, which is less than the \$10,000.00 requisite for federal diversity jurisdiction.

In the lower Court, appellant did not controvert the foregoing computation (record p. 88 line 12), but relied on the principle that when the complaint in good faith alleges facts supporting a judgment for the jurisdictional amount, the assertion by the appellee of an affirmative statute of limitations defense, which she claimed might have been waived, to reduce recovery below the jurisdictional amount, will not defeat the jurisdiction of the Court. (record pp. 58 and 88).

On her motion to dismiss for lack of jurisdiction, appellee cited NRS 147.090 which provides:

"Effect of statute of limitations. No claim which is barred by the statute of limitations shall be allowed or approved by the executor or administrator, or by the judge. When a claim is presented to a judge for his allowance or approval, he may, in his discretion, examine the claimant and others on oath and hear any legal evidence touching the validity of the claim. No claim, which has been allowed, is affected by the statute of limitations, pending the administration of the estate."

and argued (record pp. 71, 88½) that if the facts pleaded in a complaint cannot support a judgment for the requisite jurisdictional amount, a mere prayer or ad damnum clause for more than the jurisdictional amount will not sustain the jurisdiction of the Court.

In its opinion (record p. 87) the lower Court analyzed the impact of NRS 147.090, and, basing its decision on both Nevada and California cases, concluded that this probate law became part of appellant's claim, and restricted the allowable recovery in an action such as this, on a rejected claim, (record p. 91). The Court concluded that this action fell within the principle claimed by appellee, that is, that the maximum possible judgment which could legally be rendered against appellee in her representative capacity as Executrix of the estate, would be the sum of \$6,450.00.

The Court pointed out (record p. 92), that the Federal Courts are courts of limited jurisdiction, and held that if jurisdiction did not in fact exist, no personal concession by a litigant can establish it. The Court thereupon dismissed the action (record p. 93).

ARGUMENT

SUMMARY:

Point 1. The amount in controversy for federal diversity jurisdiction is ordinarily determined from the demand stated in the complaint, but this general rule is subject to the exception that if upon an inspection of the Complaint itself, it appears that, as a matter of law, it is not possible for the plaintiff to recover the jurisdictional amount, the Court will lack jurisdiction of the subject matter.

Point 2. Under the Nevada statute (NPS 147.090), neither the executrix nor the judge can waive the statute of limitations as to estate claims. The bar applies whether or not the statute is pleaded.

Point 3. The application of this state law to the appellant's claim makes it certain from her complaint that she could recover no more than \$6,450.00 plus interest, far less than the minimum jurisdictional amount.

Point 4. The want of federal jurisdiction over the subject matter cannot be waived.

Appellee will first present her argument, and thereafter will refute or distinguish the decisions and authorities cited by appellant.

Point 1. The amount in controversy for federal diversity jurisdiction is ordinarily determined from the demand stated in the complaint, but this general rule is subject to the exception that if upon an inspection of the Complaint itself, it appears that, as a matter of law, it is not possible for the plaintiff to recover the jurisdictional amount, the Court will lack jurisdiction of the subject matter.

Appellee will concede that ordinarily for federal jurisdiction the amount in controversy is determined from the demand stated in the complaint.

54 Amer. Juris. 760

But there is the exception that when, from the nature of the case alleged in the complaint, it appears that as a matter of law, it is not possible for the plaintiff to recover the jurisdictional amount, the Court will lack jurisdiction of the action.

In said reference in 54 Amer. Juris. it is further stated,

"But in some cases it may appear as a matter of law from the nature of the case stated in the Complaint that there cannot legally be a judgment in an amount necessary to the jurisdiction, notwithstanding the damages are laid in the complaint in a larger sum. When that is the situation and the plaintiff asserts as a cause of action a claim which he cannot be legally permitted to sustain by the evidence, the mere ad damnum clause will not confer jurisdiction."

The leading cases on this point were referred to by the lower Court in its written opinion; (record p. 884):

North American Transportation and Trading Co.
vs. Morrison 1900, 178 US 262, 44 L. Ed. 1061
Vance vs. Vandercook Co., 1898, 170 U.S. 468,
42 L. Ed 1111

In the written opinion of the lower court, this portion of the Vance case was quoted with approval:

"In determining from the fact of a pleading whether the amount really in dispute is sufficient to confer jurisdiction upon a court of the United States, it is settled that if from the nature of the case as stated in the pleadings there could not legally be a judgment for an amount necessary to the jurisdiction, jurisdiction cannot attach even

"though the damages be laid in the declaration at a larger sum. Barry v. Edmunds, 116 U.S. 550; Wilson v. Daniel, 3 Dall. 401, 407."

The undersigned counsel for appellee submits that one or the other of these decisions have been cited with approval in scores of decisions. No attempt will be made to list all of them. A few of the more or less recent cases, including those from other circuit courts of appeal, are as follows:

KVOS vs Associated Press, 299 U.S. 269,
81 L. Ed. 183 1936

McNutt vs Gen. Motors Accept. Corp.,
298 U.S. 178, 80 L. Ed. 1135 1935

North Pac. S. S. Lines vs. Soley, 257 U.S. 216,
66 L. Ed. 203 1921

Gray vs. Occidental Life Co., CCA 3rd 1967,
387 F. 2nd 935

Spires vs North Amer. Accept. Corp., CCA 5th
383 F 2nd 745 1967

Ringsby Truck Lines vs Beardsley, CCA 8th
331 F 2nd 14 1964

Batter vs Williams, CCA 5th 1963

316 F 2nd 940

White vs North Amer. Accident Co., CCA 10th 1963

316 F 2nd 5

Turner vs Wilson Lines, CCA 1st 1957,

242 F. 2nd 414

Giordano vs Radio Corp. of Amer., CCA 3rd 1950

183 F 2nd 558

Hughes vs Encyclopedia Brit., CCA 7th 1952

199 F 2nd 295

Odell vs Humble Oil Co., CCA 10th 1953

201 F 2nd 123

Parmelee vs Ackerman, CCA 6th 1958

252 F 2nd 721

Nixon vs Loyal Order of Moose, CCA 4th 1960,

285 F 2nd 250

McKoy Inc. vs Schonwald, CCA 10th 1965,

341 F 2nd 737

McDonald vs Patten, CCA 4th 1957,

240 F 2nd 424

Herrick vs Sayler, CCA 7th 1957,

245 F 2nd 171

F. & S. Const. Co. vs Jensen, CCA 10th 1964,

337 F 2nd 160

There are many decisions recognizing this rule, but have distinguished the particular facts involved. They include:

St. Paul Mercury, Inc. vs Red Cab Co.,

303 U.S. 283, 58 S. Ct. 586, 82 L. Ed 845 1937

Smithers vs Smith, 240 U.S. 632, 27 S. Ct. 297,

51 L. Ed. 656 1907

It is interesting to note how many times the foregoing two cases have been cited for the rule. Among other similar cases are:

Horton vs Liberty Mut. Ins. Co. (1961)

367 U.S. 348, 6 L. Ed 2nd 890

Jaconski vs Avisun, CCA 3rd 1966,

359 F 2nd 931

Food Fair Stores vs Food Fair, CCA 1st 1959,

177 F 2nd 177

Santiesteban vs Goodyear Tire Co., CCA 5th

306 F 2nd 9 1962

Of other decisions involving the rule are the following decisions of the 9th Circuit Court of Appeals:

Davenport vs Mutual Benefit 1963

325 F 2nd 785

Quinault Tribe of Indians vs Gallagher 1966

368 F 2nd 648

Southern Pac. Co. vs McAdoo, 1936

82 F. 2nd 121

Yoder vs. Assiniboine and Sioux Tribes, 1964

339 F 2nd 360

Electro Therapy Prod. vs Strong, 1936

84 F 2nd 766

Canadian Indemnity Co. vs Republic Co., 1955

222 F 2nd 601

Commercial Casualty Co. vs Fowles, 1946

154 F 2nd 884

Point 2. Under the Nevada statute (NRS 147.090), neither the executrix nor the judge can waive the statute of limitations as to estate claims. The bar applies whether or not the statute is pleaded.

Appellee contends that this statute is mandatory, and its application to appellant's estate claim makes it appear "to a legal certainty" that only the unbarred instalments of alimony, aggregating \$6,450.00, are involved in the action.

The Supreme Court of Nevada has construed the section to be mandatory, and affirmed a decision which sustained a demurrer to the complaint which showed on its face that the claim was barred. Such was the holding in Jones vs Powning, 1900

25 Nev. 399, 60 Pac. 833

California has the same statute. Their courts have consistently held that the statute is mandatory. This can even be shown for the first time on appeal.

Reay vs Heazelton, 60 P. 977, 1900

Cal. S. Ct.

It will be noted that Judge Thompson quoted at length from this case in his opinion (record p. 89). The quotation is most apt, but need not be repeated here.

struction of this statute are as follows:

Fontana Land Co. vs Laughlin, Cal. S. Ct. 1926

250 P. 669

Bryant vs Superior Ct., DCA 1936

61 P. 2nd 483

Hurlimann vs Bank of America, DCA-Cal. 1956

297 P 2nd 682

Barclay vs Blackington, Cal. S. Ct. 1899

59 Pac. 834

In re Smith's Estate, DCA Cal. 1953

264 P 2nd 638

Many of our sister states have the same statutory provision. In

In re Cocanougher's Estate, Mont. S. Ct. 1962

375 P 2nd 1014

the Montana Court said:

"This section prohibits a waiver of the Statute of limitations by an executor or judge**"

the Court citing with approval the following from a prior Montana case,

"We find ourselves in accord with the rule announced in the foregoing authorities, and

"where an executor or administrator is defending a claim and it appears to the court by pleading or evidence that the claim, or some part thereof, is barred by the statute of limitations, it is its duty to raise the bar, for otherwise the court, if it disregarded the bar of the statute, would order the claim paid in an action thereon, and on the settlement of an account it would be its duty to disallow the claim once by it ordered paid. Such a situation must not arise."

In like manner, the almost identical statute of Oregon has been sustained by the Oregon Supreme Court, when it affirmed a decision of the lower court sustaining a demurrer to the complaint. This was in

Ricker vs Ricker 1954

270 P 2nd 150

The Court said,

"This statute is mandatory. Under its plain terms, the defendant was expressly prohibited from allowing plaintiff's claim. It is such a claim as cannot be enforced against the estate of decedent. The defendant could not waive the statutory ban."

Wyoming has a statute almost identical to our statute. The Supreme Court held it to be mandatory in the case of

260 P. 2nd 309

In this case the Court cited with approval our Nevada decision (Jones vs Powning, supra.)

This circuit court had occasion to construe an almost identical statute of the Territory of Guam, in the case of

Blas vs Talabera, CCA 9th 1963

318 P 2nd 617

In this case the Court held that the record did not disclose that the statute of limitations had run, but stated that if the statute had run, the appellee's petition should not have been granted.

It appears that Michigan has a similar statute.

In a recent case of the U.S. Tax Court,

Estate of Anna Lewis,

49 TC No. 73

it was held that where the executrix and the Court had approved a claim, contrary to this statute, the estate would not be permitted to deduct the amount paid thereon in determining the taxable estate for federal estate tax purposes.

Point 3. The application of this state law to the appellant's claim makes it certain from her complaint that she could recover no more than \$6,450.00 plus interest, far less than the minimum jurisdictional amount.

As stated by Judge Thompson in his opinion (record p. 91) this probate law becomes part of a claim asserted against an estate and is effective to limit and restrict the allowable recovery in an action on a rejected claim.

Appellee submits that this application of state law to this appellant's complaint is exactly of the same nature as the application of the particular state law to the claim stated in the federal cases holding that the jurisdictional amount was not involved. Reference is made to the following federal decisions specifically involving the state law as it affected the claim:

Davenport vs Mutual Benefit Assn., CCA 9th 1963

325 F 2nd 785

McDonald vs Patton, CCA 4th 1957

240 F 2nd 424

Batter vs Williams, CCA 5th 1963

316 F 2nd 540

Spires vs No. Amer. Accept. Corp., CCA 5th 1967

383 F 2nd 745

Ringsby Truck Lines vs Beardsley, CCA 8th 1964

331 F 2nd 14

White vs No. Amer. Accident Co., CCA 10th 1963

316 F 2nd 540

252 F 2nd 721

Herrick vs Saylor, CCA 7th 1957

245 F 2nd 171

Reference is respectfully made to:

North American Transp. & Trading Co. vs

Morrison, 178 US 262, 44 L. Ed. 1061-1900

In this case the Plaintiff sued for damages suffered under a breach of a contract whereby Defendant had agreed to carry Plaintiff and his baggage from Seattle to Dawson City. It was conceded that Defendant had failed to perform and the question upon which the jurisdiction of the Court depended was the nature and amount of damages to which Plaintiff was entitled. From a judgment in favor of Plaintiff for TWO THOUSAND THREE HUNDRED ONE AND 75/100 DOLLARS (\$2,301.75), (TWO THOUSAND DOLLARS then being the jurisdictional amount), the defendant appealed.

The Court said:

"It is obvious, on the face of the plaintiff's Complaint, that if he was not entitled to recover the money which he alleged he could have earned and secured by obtaining employment and engaging in business at or about Dawson City, the amount necessary to give the Circuit Court jurisdiction was not involved. While it has

"sometimes been said that it is the amount claimed by the plaintiff in his declaration that brings his case within the jurisdiction of the Circuit Court, that was in suits for unliquidated damages in which the amount which the plaintiff was entitled to recover was a question for the jury; an inspection of the declaration did not disclose and could not disclose but that the plaintiff was entitled to recover the amount claimed, and hence, even if the jury found a verdict in a sum less than the jurisdictional amount, the jurisdiction of the Court would not be defeated. But where the plaintiff asserts, as his cause of action, a claim which he cannot be legally permitted to sustain by evidence, a mere ad damnum clause will not confer jurisdiction on the Circuit Court, but the Court on motion or demurrer, or of its own motion, may dismiss the suit. And such, we think, was the present case." Judgment reversed with order to remand to the State Court.

Point 4. The want of federal jurisdiction over the subject matter cannot be waived.

lished by the decisions. Among others are the following:

Mitchell vs Maurer, 293 US 237 1934

79 L Ed 338

Page vs Wright, CCA 7th 1940

116 F 2nd 449

In the foregoing case the answer admitted the jurisdictional facts.

Carr vs Beverly Hills Corporation, CCA 9th 1956

237 F 2nd 323

Royalty Service Corp. vs Los Angeles, CCA 9th 1936

98 F 2nd 551

Minnis vs Southern Pac. Co., CCA 9th 1936

98 F 2nd 913

Kaufman vs Liberty Ins. Co., CCA 3rd 1957

245 F 2nd 918

In the case of Mitchell vs Maurer, supra, the question of the federal jurisdiction had to be based upon the diversity of citizenship. The question was not raised in the District Court, nor in the Circuit Court of Appeals. Mr. Justice Brandeis reversed with directions to dismiss

"Unlike an objection to venue, lack of federal jurisdiction cannot be waived or be overcome by an agreement of the parties. An appellate federal court must satisfy itself not only of its own jurisdiction, but also of that of the lower courts in a cause under review." (Citing cases.) "Hence, the failure of the Insurance Commissioner to claim, in his petition for certiorari, that the order of the District Court was void for lack of federal jurisdiction of the suit, and his failure otherwise to call to the attention of this Court the lack of diversity of citizenship are immaterial."

It will be noted that appellant referred to no authorities on this point in her opening brief. It appears that there are none to which she could refer.

Re: Appellant's Argument:

Appellee submits that the authorities cited in the argument in her brief wholly fail to sustain her position.

Appellant states that "The amount in controversy is determined from the face of the complaint, irrespective of a valid defense apparent on the face of the complaint".

We respectfully object to this inaccurate statement of the rule. We feel that the rule should be stated thusly:

The amount in controversy is determined from the face of the complaint, irrespective of the fact that it discloses that a valid defense to the claim is available if asserted.

Such is the clear wording of the decision in the case of Smithers vs Smith (supra) cited by appellant. In her quotation it is clear that the defense "might be interposed".

Appellant cites and relies upon the 9th Circuit case of

Armstrong vs New La Paz Gold Mining Co., CCA 9th
1939; 107 F 2nd 453

wherein Judge Stephens quoted from the St. Paul case, with approval, to the effect that it must appear to a legal certainty that the claim is really for less than the jurisdictional amount to justify dismissal. Appellant neglects to add the statement of Judge Stephens which follows the quoted statement, as follows:

"Such legal certainty does not
appear in the instant case."

We submit that this certainly recognizes the rule relied upon by the appellee, but distinguishes the case on the facts.

In the ordinary case the statute of limitations is an affirmative defense which can be waived. Such was the basis for the holding in the case of Kissick Construction Co. vs First Nat'l. Bank, 46 F. S. 869, cited by appellant.

The statute was asserted by the defendant as to one cause of action, and the Court held that this did not affect the question of jurisdiction to deal with the second cause of action, once jurisdiction had attached.

Likewise, in the district court case of Griffin vs Smith, 256 F. S. 746, cited by Appellant, it is clear that the Court recognized that the defense might not be asserted.

We submit that this situation is not the same at all as with the facts of the instant case, where the applicable state law prevents the approval of a claim admittedly barred by the statute of limitations.

Appellant cites the case of

Anderson - Thompson, Inc. vs Logan Grain Co.,

238 F 2nd 598 (10th CCA 1956)

We submit that this case is not in point, although the inaccurate statement of the rule appears therein as pure dicta. In this case admittedly the Court had jurisdiction when the complaint was filed. Subsequently the plaintiff sold the seed for salvage value, and the amount of the final recovery was below the jurisdictional amount. This clearly did not affect the jurisdiction.

Appellee submits that the texts and digests cited by appellant, instead of supporting her position, uniformly set forth both the general rule and the exception thereto advanced by appellee in her argument. Appellant has quoted only that which she wished to quote. No effort will be made to point out the differences in each text, but as illustration, appellee will point only to the one reference

in 35A CJS, Federal Civil Procedure, Sect. 274, p. 409. It is also stated therein:

"Such claim or general allegation is sufficient unless the complaint contains other allegations so qualifying or detracting therefrom that, when all of the allegations are considered together, jurisdiction cannot fairly be said to appear on the face of the Complaint, or, as frequently stated, it appears to a legal certainty that less than the jurisdictional amount is involved."

Appellant presents no argument that the law of Nevada, under NRS 147.090 is not as found by Judge Thompson. She contents herself by citing three California cases, which she claims affect the rule as stated by Judge Thompson.

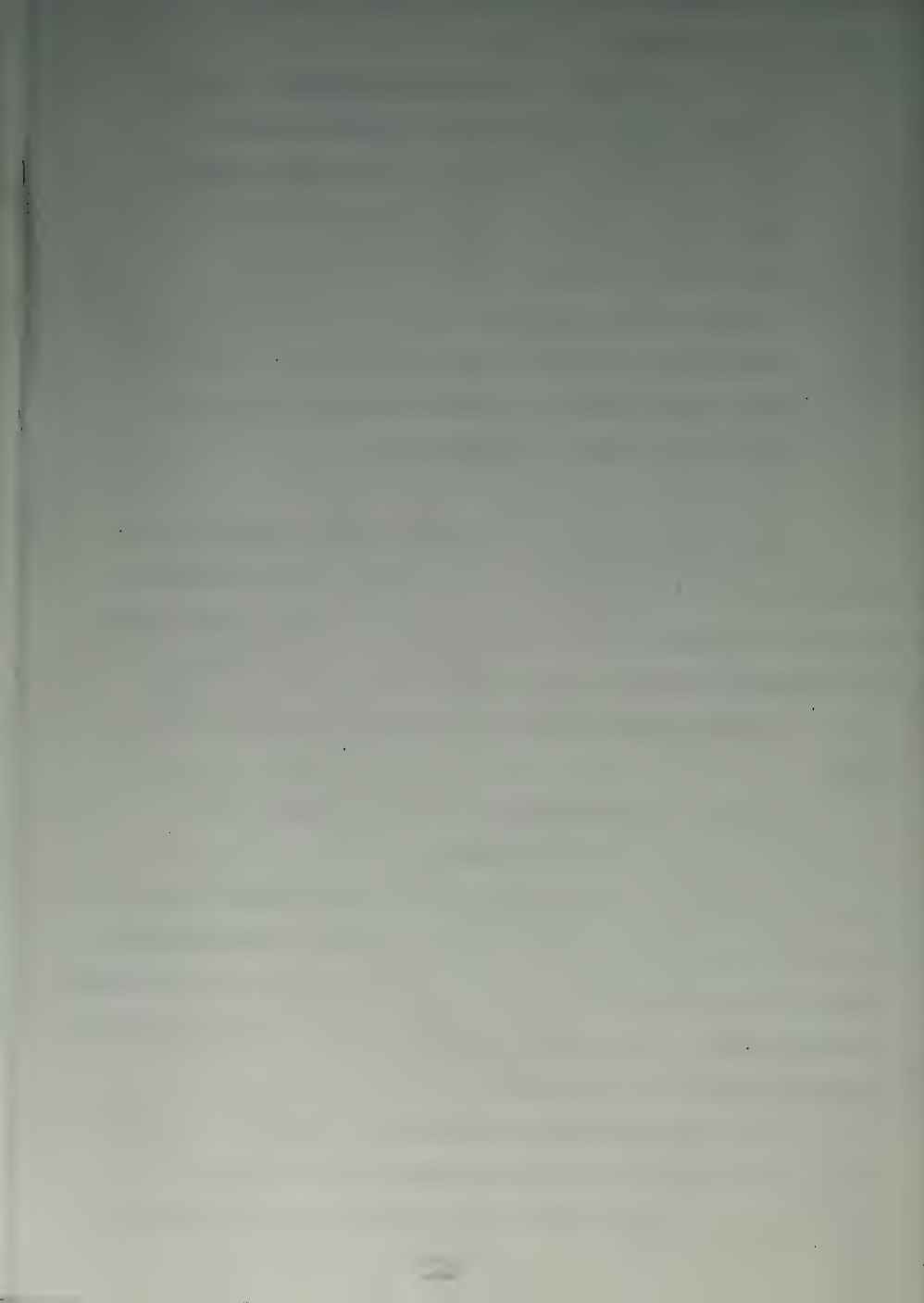
Appellee contends that none of these cases are in point.

Faias vs Superior Ct., 133 Cal. Appel. 525

24 P. 2nd 567 (1933)

was an application for certiorari to review orders entered in an estate proceeding. One order approved a compromise of a claim, an unspecified part of which was barred by the statute of limitations. The total claim was for \$4,700.00, and the compromise was for \$3,000.00.

The Appellate Court pointed out that the order approving the compromise was appealable, and if there was error, it was not one subject to correction in certiorari.



In the case, appeal was taken from the settlement of the account which included a compromise for \$500.00, of a claim on a note secured by mortgage signed by deceased. The note was barred by the statute of limitations but it appeared that foreclosure could still proceed, that attorney fees in any event would consume assets of the estate, and to get a clear and marketable title to the real estate was worth the sum to be paid in compromise.

The Court also pointed out that the order of compromise could have been appealed and that this proceeding was a collateral attack on the order of compromise.

In passing, the Court pointed out that if there was a conflict between the statute requiring the rejection of a barred claim, and the authority of the Court to approve a compromise beneficial to the estate, the statute authorizing the latter would govern, since it was adopted later.

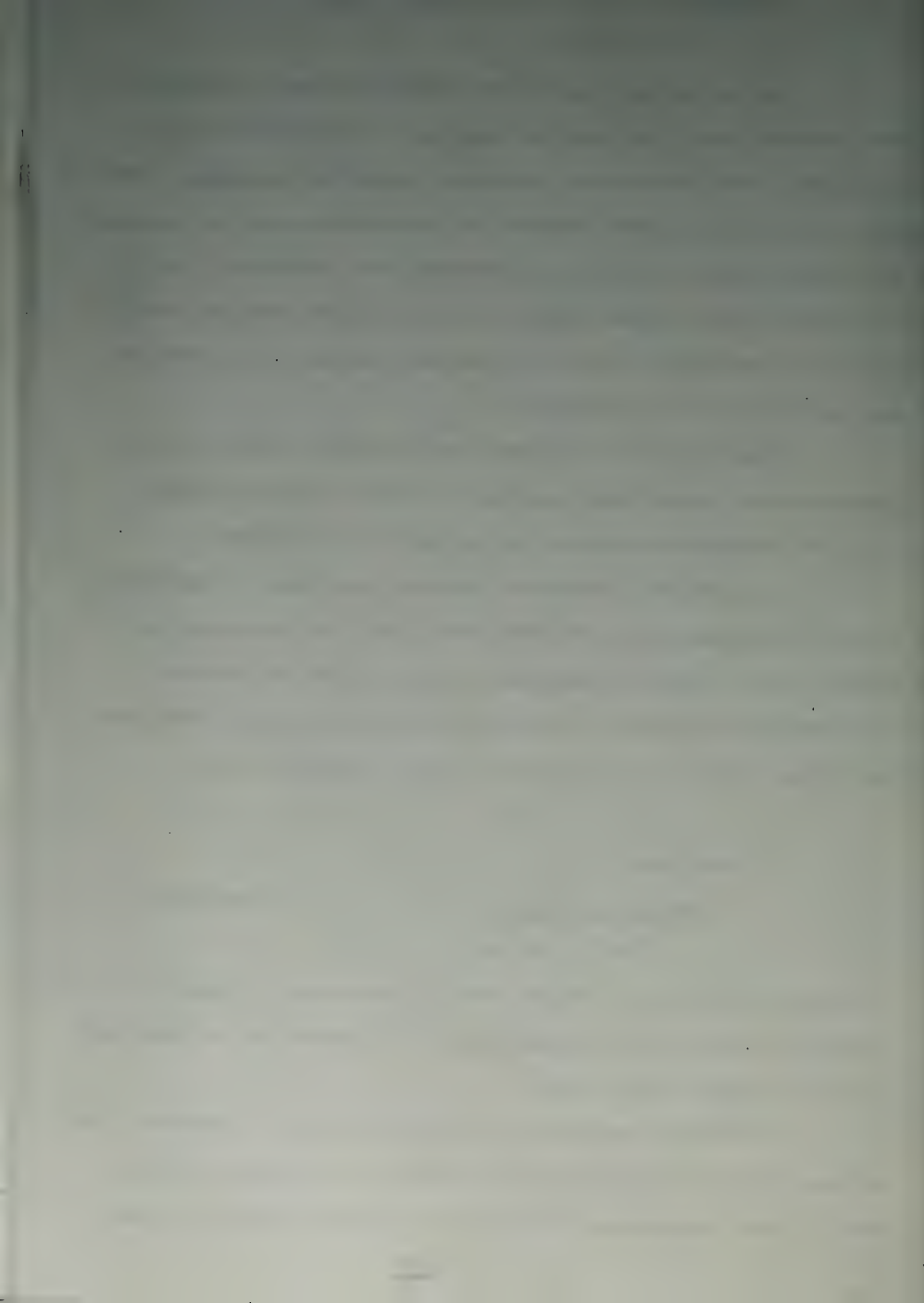
In the case of

Lewis vs Neblett, Cal. S. Ct. in bank 1957

311 P 2nd 489

the claim against the estate was to establish a trust in realty. The parties stipulated to an extension of the time of trial beyond five years.

Defendant contended this was void under section 716 of the probate code (our NRS 147.090). The Supreme Court said it was unnecessary to determine whether the five years



provision was a statute of limitation, for if it was, before it ran an administrator could extend it. Court remarks that when it is questionable whether an action against the estate is barred by the statute of limitations, the administrator may enter into an agreement compromising the matter (citing Re Lucas.) The judgment below was affirmed.

This case is obviously not applicable to a money claim clearly barred by our statute of limitations, as in the instant case.

In her brief, appellant claimed that appellee was bound by an admission in her answer to the effect that the Court had jurisdiction. She cited no authorities or decisions supporting this contention. As stated before, there are none that could be cited by appellant to support her contention.

CONCLUSION

It is respectfully submitted that the complaint on its face disclosed that under Nevada law, the most that could be recovered was for 31 instalments of \$150.00 each, aggregating \$6,450.00, and the Court did not err in dismissing the action for lack of the jurisdictional amount.



R. K. Wittenberg, Attorney for Appellee

APPENDIX

N.R.S. 11.190. Periods of limitations prescribed. Actions other than those for the recovery of real property, unless further limited by N.R.S. 11.205, or pursuant to the Uniform Commercial Code, can only be commenced as follows:

1. Within six years:

(a) An action upon a judgment or decree of any court of the United States, or of any state or territory, within the United States.



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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

* * * * *

ROSALIE RIGGINS,

Appellant,

vs

MARGARETT K. RIGGINS, Executrix
of the Estate of LESLIE E. RIGGINS,
Deceased,

Appellee.

No. 22755

CERTIFICATE OF ATTORNEY TO BRIEF

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

R. K. WITTENBERG
R. K. Wittenberg, Attorney for Appellee

NO. 22757

UNITED STATES
COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARTTI QUETZI RUONA,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Upon Appeal from the Judgment of the United States
District Court for the District of Oregon

BRIEF FOR THE APPELLEE

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NO. 22757 ✓

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UNITED STATES OF AMERICA,

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Upon Appeal from the Judgment of the United States
District Court for the District of Oregon

BRIEF FOR THE APPELLEE

COUNTER-STATEMENT OF FACTS

On Monday, October 2, 1967, defendant Martti Ruona was in San Francisco, California. He claims he had been taking "psychadelic" drugs. He was out of money, and wanted to return to his home in Seattle. He had come down to San Francisco to spend the previous weekend with two "hippie" friends named "Snoopy" and "Jimbo". He went to the Traveller's Aid Society in San Francisco and was refused a bus ticket. He was afraid to call his parents because he was on parole from a previous Dyer Act conviction. Since he was unable to obtain a bus ticket at Traveller's

Aid, he claims he decided to hitchhike home (Tr. 69-74).

Ruona claims that at midnight, Monday, October 2, 1967, he started hitchhiking from San Francisco back to Seattle (Tr. 72). At approximately the same hour, a 1965 Ford automobile belonging to Robert R. Sears was stolen from in front of a restaurant in downtown San Francisco where Mr. Sears had parked it (Tr. 44).

Fourteen hours later, at about 2:00 P.M. the next day (Tuesday, October 3, 1967), Mr. Ruona was found in the stolen 1965 Ford on a lonely dead-end mountain road 463 miles north of San Francisco (Gov. Ex. 11), some three miles off Oregon coast highway 101 just south of Bandon, Oregon (Tr. 5). The car was in the ditch and Ruona was trying to get it out (Tr. 6, 10, 22). Three local residents passed along the mountain road and saw the car. Two of them, William Hampton, a local newspaper salesman, and Bessie Waterman, a local schoolteacher, identified Ruona from the witness stand (Tr. 16, 27). William Moore, a rural resident, did not identify Ruona in the courtroom but accurately described him as a twenty-year-old blonde "pimple-faced" youth (Tr. 7-8). The trial was held on December 21, 1967, and these in-court identifications occurred about two and one-half months after the alleged crime.

Ruona spoke with the three local residents who stopped beside the stolen automobile on the mountain road. The first to come along was William Moore at about 2:00 P.M., October 3, 1967 (Tr. 5). Moore offered to help Ruona and told Ruona that he would be back in about an hour (Tr. 7). Mrs. Waterman came by about 3:00 P.M. on her way home from school. Mrs. Waterman described her conversation with Ruona as follows:

"Well, there was a man in the front seat, and I asked him if he had had trouble, and he said yes and I said, could I get help for you and he said he had no money, only travel aid. And I said 'Well I can't help you' and he told me that some man had come along and said that he would help him later. And I asked him if I -- if he thought that I could get around him, and he said 'Yes'."
(Tr. 24)

William Hampton stopped about 3:30 P.M. and asked Ruona if he could help him. Ruona replied,

"... that he had already sent for help and was looking for it very shortly." (Tr. 11)

A blue plaid suitcase belonging to Ruona (Gov. Ex. 6) was seen in the car by William Hampton when he stopped to help Ruona (Tr. 16, 58).

Ruona was picked up by local police on Highway 101 just north of Bandon, Oregon, about two hours after Hampton talked to him. He was driven directly to Hampton's residence and Hampton promptly identified him (Tr. 19). At the time of his arrest, Ruona had in his possession the blue plaid suitcase, the Traveller's Aid application (Ex. 5), the registration certificate for the stolen automobile which Mr. Sears, the owner, testified had been on the vehicle's steering column (Ex. 7; Tr. 55, 37). Ruona also had with him four gasoline credit card purchase receipts (Exhibits 1, 2, 3 and 4; Tr. 56-57). The automobile registration was in Ruona's blue plaid suitcase together with three of the gasoline slips (Exhibits 1, 2 and 3), which showed purchases of gasoline during the trip up the coast from San Francisco. Exhibit 1 was for a purchase of gasoline at San Francisco on October 2, 1967; Exhibit 2 was for a purchase of gasoline at Laytonville, California on October 2, 1967; and Exhibit 3 was for a purchase of gasoline at Crescent City, California on October 3, 1967. Both Laytonville and Crescent City are located on Highway 101

between San Francisco and Bandon, Oregon (Gov. Ex. 11).

The fourth gasoline slip (Ex. 4) was in Ruona's left front trouser pocket when he was arrested (Tr. 56). It was a receipt for a purchase of gasoline made by Mr. Sears, the owner of the stolen automobile, two months earlier (Tr. 39), and shows Mr. Sears' Shell Credit Card number. After his arrest, Ruona was detected trying to wad it up and throw it away (Tr. 57).

Exhibit 3 is a receipt for gasoline purchased at the Don A. Johnson Chevron Station at Crescent City, California, on October 3, 1967. This station is on Highway 101 just south of Crescent City (Tr. 77). There was a State Police safety check roadblock set up on Highway 101 on October 3, 1967 just inside Crescent City, California (Tr. 76; D. Ex. 21). Ruona was seen at this roadblock by California Highway Patrolman James Osborn (Tr. 78). Ruona himself admitted being at the roadblock at Crescent City (Tr. 69).

ARGUMENT

Defendant's first assignment of error is that the trial judge should have taken the case from the jury at the close of the Government's evidence because the eyewitness identifications of the three local residents should not have been admitted, there was an overall lack of evidence to support conviction, and the gasoline sales slips constitute additional proof in favor of defendant.

This case was tried to a jury. Defendant's trial counsel was Mr. Cheney, who is also his counsel on this appeal. Defendant's trial counsel was furnished with summaries of the testimony in advance of trial

in compliance with the rule of the Oregon District Court requiring the Government to furnish all Government's witnesses' testimony to the defendant at least 24 hours in advance of trial. Mr. Cheney was fully apprised in advance as to what the identification testimony would be and made no pretrial motion to exclude any of the identifications. Furthermore, at the trial, Mr. Cheney made no objection to the receiving in evidence of any of the identification testimony and actually cross-examined the identification witnesses personally.

Even if timely objection to the testimony had been made in advance of trial or at the trial itself, the circumstances surrounding the identifications make it clear that the testimony would have been perfectly admissible. Mr. Moore and Mr. Hampton and Mrs. Waterman are all local residents of a sparsely populated, isolated Oregon coastal community. It is not likely that they would forget a stranger with a distinctively "hippie" appearance with long blonde hair and a badly scarred face carrying a blue plaid suitcase and driving a California automobile. To these witnesses defendant's appearance on the lonely mountain dead-end road must have been a distinctively impressive apparition indeed. Although the same could perhaps not be said of a crowded urban area such as New York, Chicago or San Francisco, it is distinctly unlikely that more than one such individual would be seen in the coastal mountains of southern Oregon on any particular afternoon such as the afternoon of October 3, 1967.

The time period which elapsed from the date of the alleged crime to trial was about two and one-half months. Thus, the events were fresh in the minds of the witnesses. No effort was made by the Government to

"shore up" the recollection of the witnesses between the time of their seeing Ruona and the trial. There was no line-up and no pictures were shown to the eyewitnesses in order to affect their recollection. All three of the witnesses saw and actually conversed with Ruona.

Defendant's counsel suggests that it was improper for the local police to take Ruona back to Mr. Hampton's house after they found him on the highway. However, this was a perfectly natural thing to do in view of the isolated nature of the community and the fact that Mr. Hampton had seen and spoken to Ruona only two hours earlier. It was only when Mr. Hampton identified Ruona in the presence of the local police that he was arrested. It would have been entirely unreasonable to expect the local police authorities to make their decision on whether to hold Ruona without checking with any of the eyewitnesses who had spoken to him just two hours earlier. It is also obvious that any kind of an adequate line-up would have been impossible to arrange in that particular community.

Finally, it is clear that the identification of Ruona as the individual who was in the stolen automobile on the mountain road did not depend upon the testimony of the eyewitnesses. In addition to this testimony, there was the fact that Ruona's blue plaid suitcase was seen in the automobile and was in his possession at the time of his arrest. Furthermore, Ruona had with him the automobile registration which had been on the steering column of the stolen automobile and gasoline purchase slips bearing the license number of the stolen automobile. Ruona was able to advise the arresting officer that keys which he had in his possession did not fit the stolen automobile (Tr. 61). In addition,

the jury was presented with the inescapable fact that both the defendant and the stolen automobile travelled over the same route at the same time starting about midnight, October 2, 1967, at San Francisco and ending up some fourteen hours later in the mountains outside Bandon, Oregon. We are fully in accord with the cautionary principles expressed in United States v. Wade, 388 U.S. 218, cited by defendant (Appellant's Brief, p. 7, et seq). However, nothing in Wade would have required the trial court to exclude the eyewitness identifications under the circumstances shown in this case.

Defendant argues that there was insufficient evidence of defendant's having knowingly transported a stolen automobile in interstate commerce to take the case to the jury. Defendant's explanation of his presence in Bandon, Oregon, on October 3, 1967, was that he had hitchhiked there. He testified that he was returning to his home at Seattle, Washington (Tr. 73). However, he did not explain why he was found in an isolated mountainous area on the Oregon coast far from any direct route between San Francisco and Seattle.

The physical facts belie defendant's claim of hitchhiking. It would take approximately nine and one-half hours to travel the 463 miles between San Francisco and Bandon at an average continuous speed of 50 miles per hour. Defendant was first seen about fourteen hours after he claimed he left San Francisco. The jury could well have inferred that it was inherently improbable that a lonely individual with the appearance of a "hippie" could have such success in hitchhiking along a lonely coastal highway in the middle of the night. Furthermore, if defendant had been hitchhiking and had been let off fifteen miles south of Bandon

as he claimed (Tr. 70), he has not explained his presence three miles up into the mountains on a dead-end gravel road. It is unlikely that if he had been hitchhiking with a suitcase, he would have walked up this road, particularly inasmuch as there is a sign at the entrance to the road indicating that it is a dead-end road (Gov. Ex. 10). Defendant's claim to have been hitchhiking also leaves unexplained his possession of gasoline credit receipts for the stolen automobile and the registration of the stolen automobile. How did he come into possession of these items? Why did he have put them in his suitcase?

It is obvious from all of the evidence that Ruona stole the car on the night of October 2, 1967, in San Francisco and drove all night, arriving in Bandon, Oregon, early the following afternoon. At that point it would have been perfectly reasonable for him to turn off the highway onto a deserted road in order to get some sleep. In doing so, the automobile became disabled and Ruona abandoned it.

Defendant further argues that his possession of gasoline sales receipts shows his innocence. We are at a loss to understand the logic of this argument. It is clear that Ruona found old gasoline receipts bearing the numbers of the owner's Chevron and Shell credit cards in the car and used these numbers to buy more gasoline. His possession of them implies his guilt, not his innocence.

Defendant finally urges that the case should have been withdrawn from the jury because of the "uncontradicted" testimony of Dr. Dixon that defendant could not have formed specific intent had he taken all of the drugs he testified he took prior to his being arrested.

Dr. Dixon's testimony was entirely based upon the assumption that defendant had in fact taken all of the drugs which he claimed to have taken. Defendant testified that prior to his being arrested, he had taken the following drugs:

"A I had consumed approximately 2500 micrograms of LSD and one capsule of STP, eight Amphetamine tablets, approximately six \$5 papers or bags of Amphetamine crystal, a small amount of Opium, and a little Morphine. A half a grain of Morphine.

Q Do you know the strength of the Amphetamine tablets?

A Anywhere between fifteen and twenty-five milligrams."
(Tr. 69)

Dr. Dixon testified that the amount of drugs which Ruona claimed he had taken was

"some ten times the average dose . . . for producing psychotic experiences in any individual . . ." (Tr. 82)

Dr. Dixon, after some hedging, testified that an individual who had taken this quantity of drugs would in effect be visually blind (Tr. 88).

Dr. Dixon testified that there have been no human volunteers to test the effect of such a dose of these "psychedelic" drugs. However, he indicated that a dose slightly above normal had been found in the only experiment known to him to have been fatal to an elephant (Tr. 88-89, 93).

Dr. Dixon testified that the dosage which killed the elephant was "slightly" above what he understood to be the "normal" dose (Tr. 90-91). It was obvious to the jury from Dr. Dixon's testimony that if Ruona had actually taken all of the drugs he claimed to have taken, he would have been blind, physically disabled, and probably dead. In actual fact, Ruona had been able to travel from San Francisco to Bandon, Oregon, and had what he claimed to be a very clear recollection of the trip. He

claimed to recall that he was outside of San Francisco before twelve o'clock midnight October 2, 1967 (Tr. 72). He claimed to have recalled being with two "hippie" friends. He recalled attempting to borrow money from Traveller's Aid Society and even recalled in detail a conversation he had with the lady there (Tr. 73). He claimed that he got a ride on the other side of the Golden Gate Bridge near Mill Valley, California. He even recalled that the automobile was a 1958 Chevrolet (Tr. 70). He recalled being in Crescent City, California, on October 3, 1967, and described in detail seeing the State Police safety roadblock which had been set up there (Tr. 69). He claimed to have recalled being let off "about 15 miles south" of Bandon and claimed to have gotten a ride into Bandon with "three fishermen" (Tr. 70). He stated that he was apprehended approximately seven miles north of Bandon, Oregon (Tr. 71), although he admitted that he had never been in the Bandon area previously (Tr. 74). Despite the clear recollection which he claimed to have of all of these events, he denied having any recollection of the stolen 1965 Ford (Tr. 71).

It was also clear from the testimony of the eyewitnesses that defendant was able to talk coherently, perceive the predicament which he was in, endeavor to get the car out of the ditch, and recall for Mr. Hampton and Mrs. Waterman that Mr. Moore had come by and offered to come back and help him. Mrs. Waterman observed his condition in the car and testified when asked about his condition that

"He seemed all right to me." (Tr. 26)

Ruona was in sufficient possession of his faculties to steal the automobile's registration certificate and hide it in his suitcase. He also was sufficiently aware of the trouble he was in to attempt to throw

away the gasoline credit slip which he had used to purchase gasoline on Mr. Sears' credit card number (Tr. 57). He was sufficiently aware to advise the arresting officer that keys which he had with him did not fit the stolen car (Tr. 61). It is obvious that he was aware of the meaning and use of a credit card receipt and was able to purchase gasoline using the receipt without the credit card itself. During his conversation with Mrs. Waterman he advised her that he had "no money, only credit cards" (Tr. 24). At the time of his arrest he had placed the three credit card invoices which evidenced his purchases of gasoline at San Francisco, Laytonville and Crescent City (Exhibits 1, 2 and 3) in his suitcase. However, he still had with him in his trousers' pocket the purchase receipt (Ex. 4) which had been signed by Mr. Sears two months earlier which he had been using to purchase gasoline.

It was perfectly obvious from the combined testimony of Ruona and of Dr. Dixon that Ruona could not have had the quantity of drugs which he claimed to have had. Even his purported recollection in detail of the exact quantities of these drugs belies his claim that he took them for if he had taken them, he would not have been in any condition to have such an exact recollection of the dosage. In any event, it is clear from the corroborating physical circumstances and actions of Ruona during the time of the offense that he was in sufficient possession of his faculties and aware of his surroundings and predicament to behave in a normal manner.

With the testimony in this posture, the trial judge was not required to withdraw the case from the jury. It is well established that a jury is not bound by the testimony of a defendant's doctor. They are entitled to disregard it completely if they do not believe the testimony

CONCLUSION

The evidence clearly established that Ruona stole the automobile in question at San Francisco, California, on the night of October 2, 1967, and drove it to Bandon, Oregon, where he was found in it and apprehended.

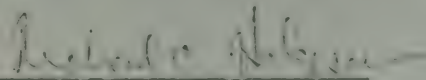
The judgment of conviction should be affirmed.

Respectfully submitted,

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United States Attorney
District of Oregon

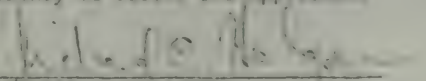
RICHARD C. HELGESON
Assistant United States Attorney
Attorneys for Appellee

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.


RICHARD C. HELGESON
Assistant United States Attorney
Of Attorneys for Appellee

CERTIFICATION OF SERVICE BY MAIL

I HEREBY CERTIFY that I have made service of the foregoing Brief on the Appellee on the Appellant herein by depositing in the United States Post Office at Portland, Oregon, on July 18, 1968, two certified copies, exact and full copies thereof, enclosed in an envelope with postage prepaid, addressed to Marshall C. Cheney, Jr., Esq., Pacific Building, Portland, Oregon 97204, attorney of record for Appellant.


RICHARD C. HELGESON
Assistant United States Attorney
Of Attorneys for Appellee





N O. 22758

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LONZO NUTTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S OPENING BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

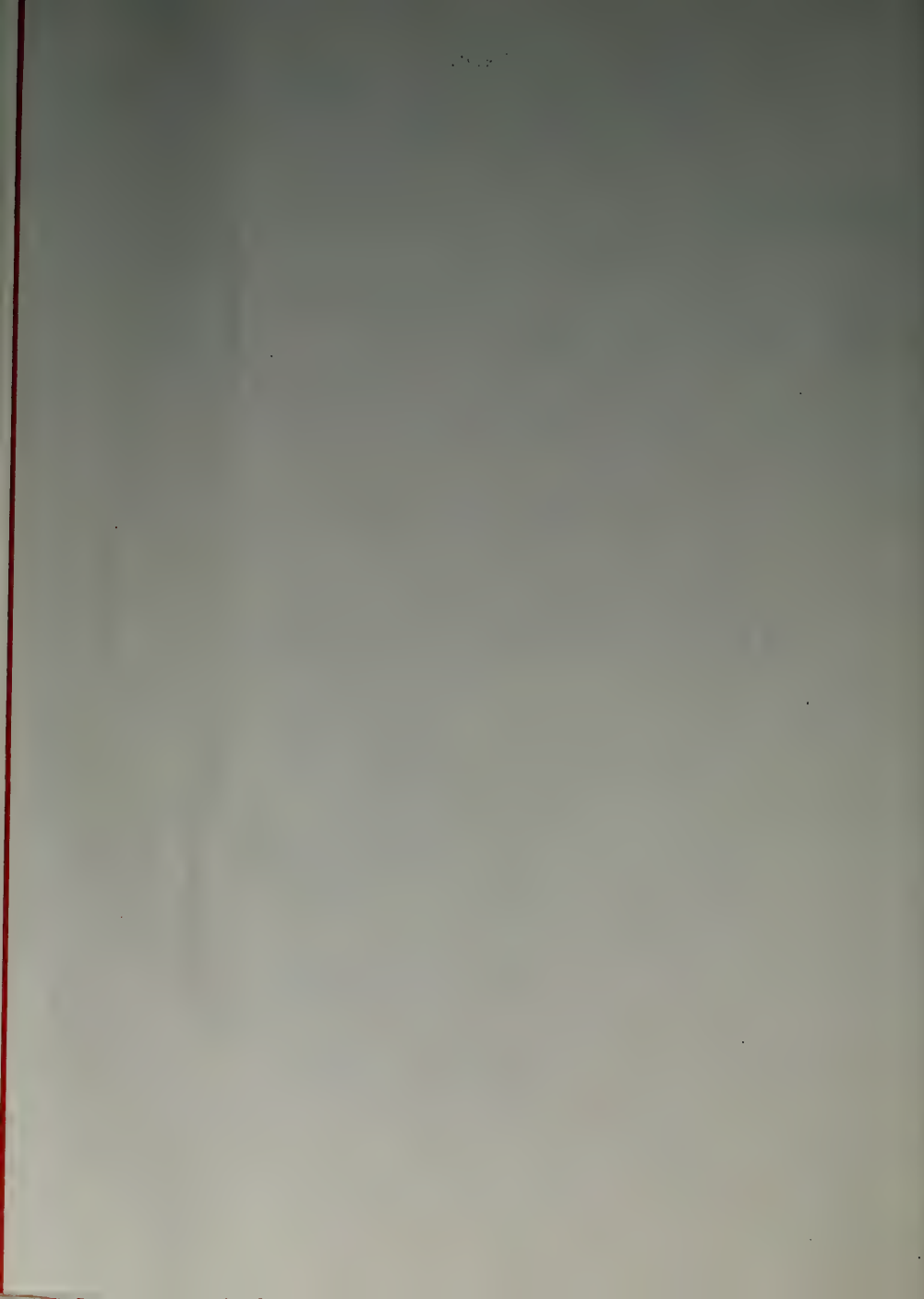
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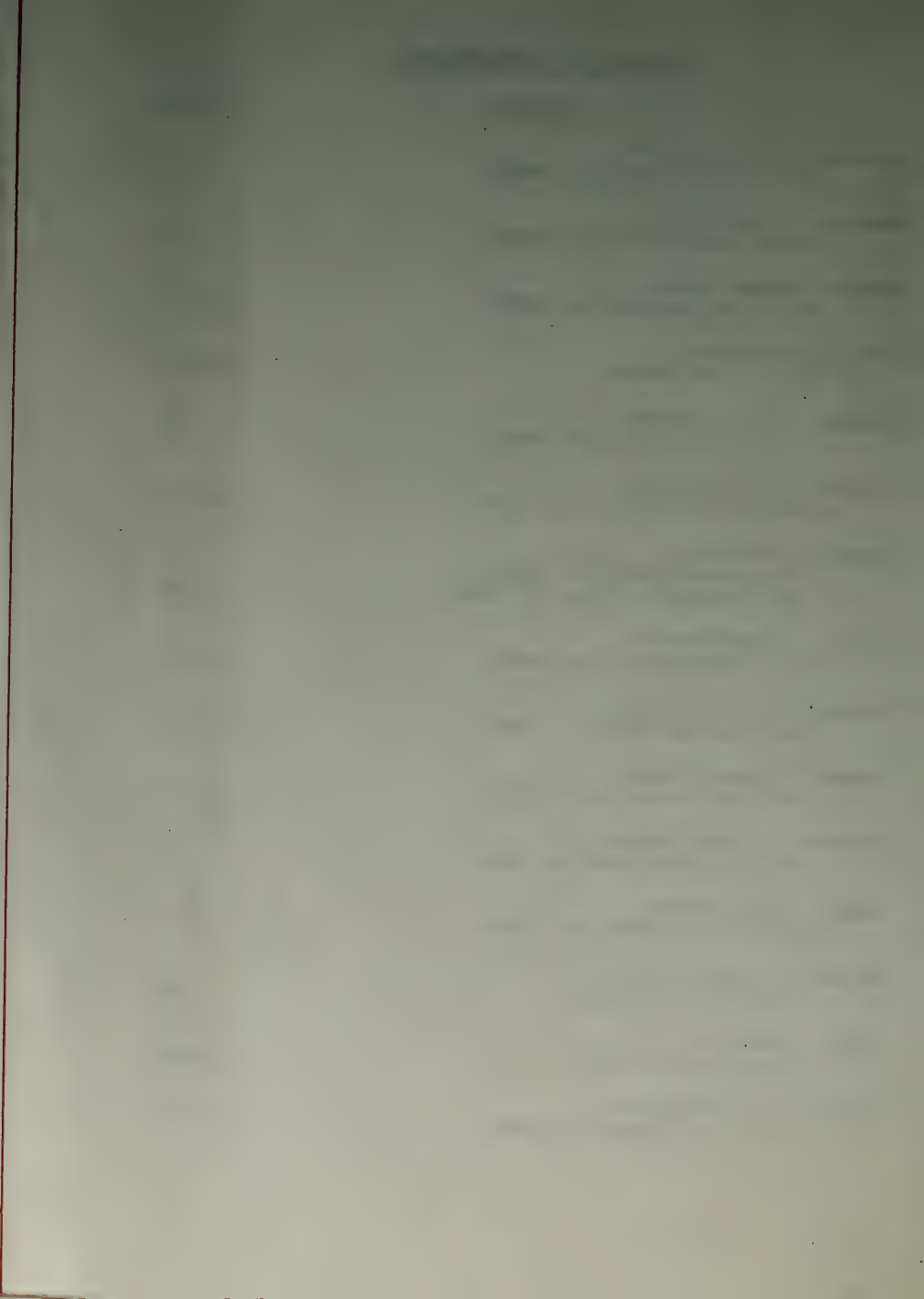
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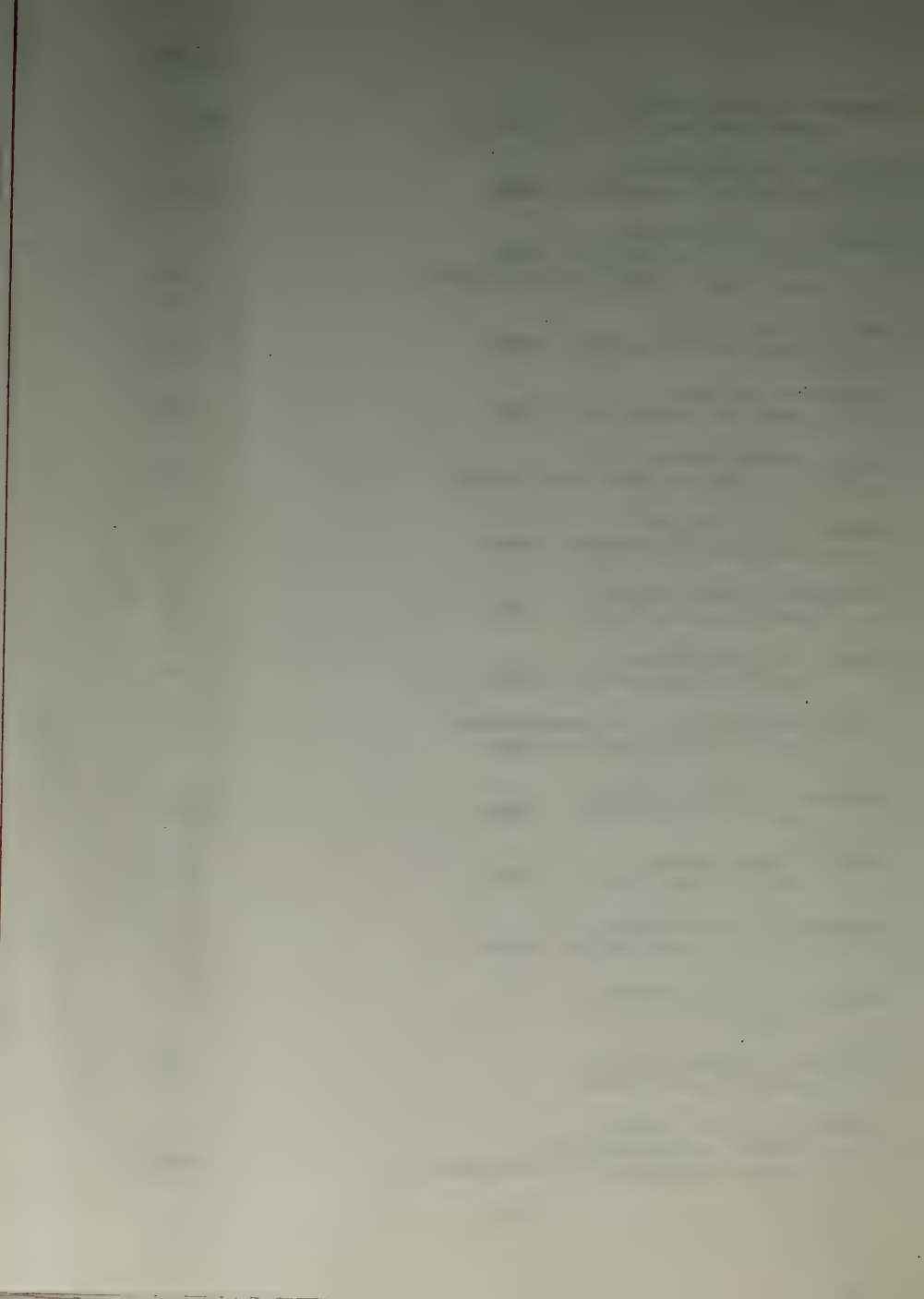
The first part of the paper discusses the importance of the study of the history of the United States. It is argued that a knowledge of the past is essential for a full understanding of the present. The author then goes on to discuss the various factors which have shaped the development of the United States, including the influence of the British, the Spanish, and the French. The author also discusses the role of the American people in the development of the country, and the importance of the American Revolution. The paper concludes by discussing the future of the United States, and the role of the American people in shaping that future.

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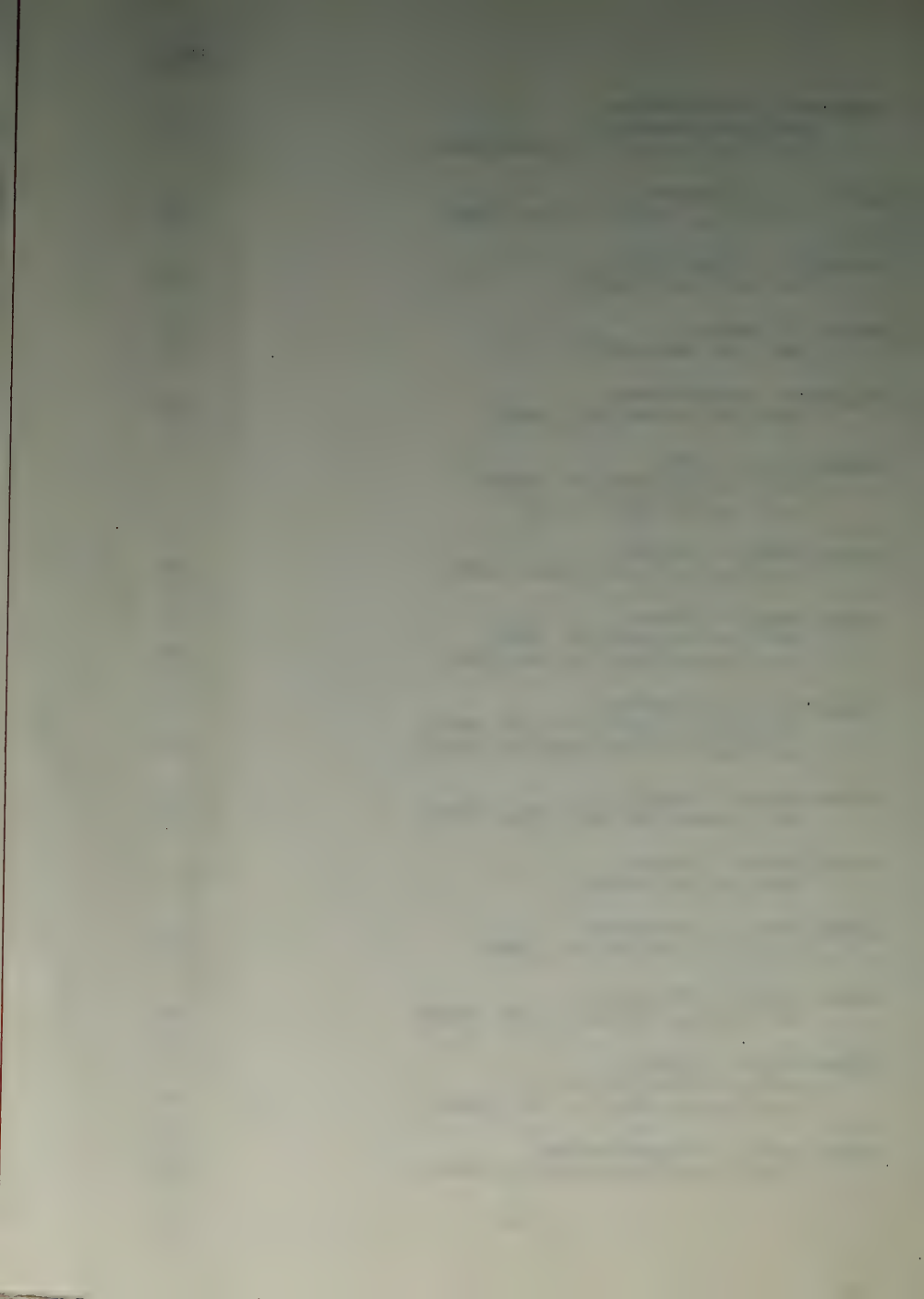
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IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

LONZO NUTTER,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S OPENING BRIEF

I

QUESTIONS PRESENTED

1. Is Title 21, United States Code, §174 unconstitutional, in that:

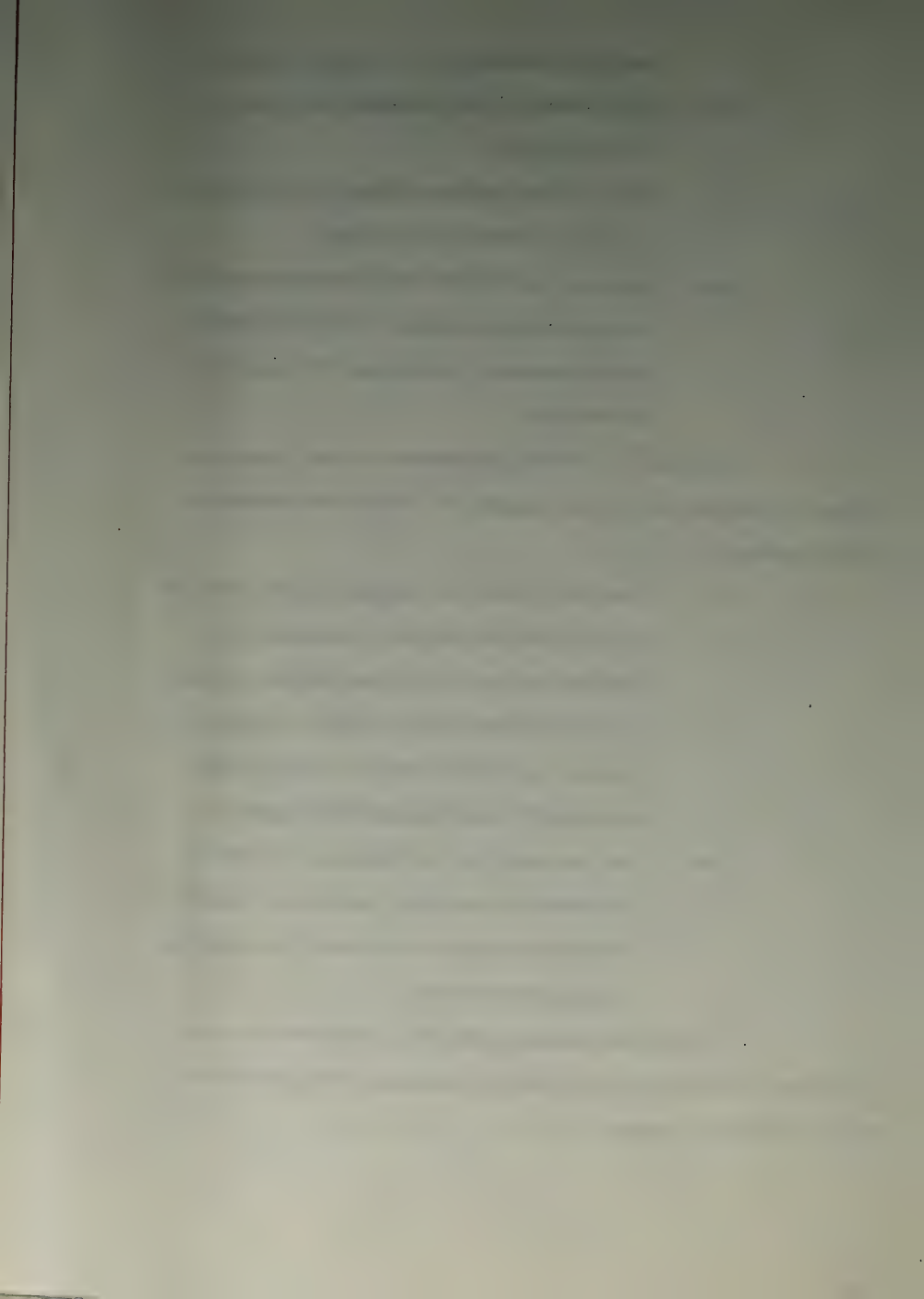
- (A) the provision referring to "unexplained possession of a narcotic drug is sufficient evidence to authorize a conviction" shifts and changes the burden of proof?
- (B) the provision referring to "unexplained possession of a narcotic drug is sufficient evidence to authorize a conviction"

- deprived defendant of his right to silence?
- (C) the phrase "to the satisfaction of the jury" is uncertain?
 - (D) this section deprived defendant of his right to equal protection of the law?
 - (E) there is no rational connection between the fact proved (possession of heroin) and the facts presumed (knowledge of illegal importation)?

2. Did the fact that the defendant's prior felony conviction for selling heroin was brought out deprive the defendant of due process?

- 3. (A) Was the limitation imposed by the court on the permissible scope of examination by defense counsel of William Davis, a denial to the defendant of his right to confront a witness against him so as to violate the defendant's Sixth Amendment rights?
- (B) Did the court err in refusing to allow the defendant to treat Mr. Davis as a hostile witness and question him as if he were on cross examination?

4. Is the Government's failure to disclose the identity of the informant prior to trial a violation of the defendant's Sixth Amendment rights?



II

STATEMENT OF FACTS

On June 6, 1967, one William Jackson was employed as an agent for the Federal Bureau of Narcotics [R. T. 58].^{1/}

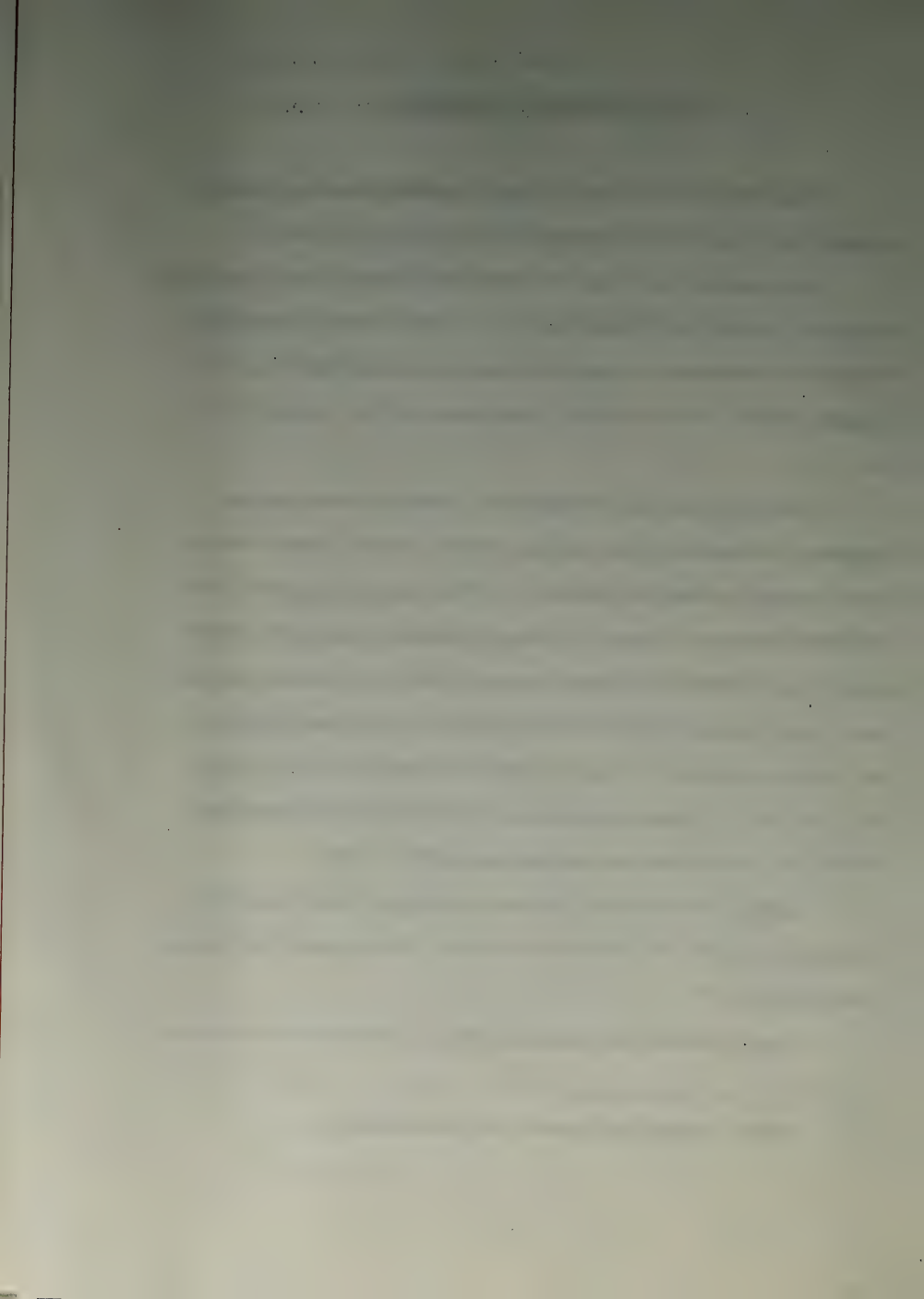
On June 6, 1967, Mr. Jackson met for the first time, the defendant LONZO NUTTER [R. T. 59]. Mr. Jackson was introduced to the defendant by one Bill Davis, an informant for the Federal Bureau of Narcotics, at the home of Mr. Davis [R. T. 60].

Shortly after the introduction, Agent Jackson and the defendant proceeded to the kitchen of Mr. Davis' house, where Agent Jackson asked the defendant, "What have you got?" The defendant removed a small package wrapped in tinfoil from his pocket and handed it to Agent Jackson, who then opened the package. Agent Jackson observed the contents of the package to be two condoms, each of which contained a quantity of tan powder [R. T. 60, 61]. These two condoms were part of Government's exhibit No. 1B introduced into evidence [R. T. 77].

Agent Jackson said, "It looks all right. How much do you want for it?" The defendant replied, "It's a good half-ounce. I want \$350.00."

Agent Jackson then stated, "Well, I don't have that much

^{1/} "R. T. " refers to Reporter's Transcript.



money. I can pay \$345.00 for it." Whereupon the defendant responded, "All right. I will let you have it at this time for \$345.00." [R. T. 61].

Agent Jackson retained possession of the two condoms and gave the defendant \$345.00. Jackson then said, "I need some more stuff in a few days" and the defendant replied that he was "always available and always had stuff", and that Agent Jackson should get in touch with Bill Davis who would know how to reach him [R. T. 61].

On June 12, 1967, Agent Jackson once again met with the defendant. This meeting took place in front of 543 Crocker Street, Los Angeles [R. T. 67]. When Agent Jackson arrived at this location, the defendant then entered the vehicle in which Mr Davis was driving and Agent Jackson was a passenger [R. T. 68]. Agent Jackson asked the defendant what he had and the defendant replied that he had three ounces for which he wanted \$1050.00. Agent Jackson said that this was a lot of money and that he first would have to see what he was buying [R. T. 68, 69].

The defendant then left the vehicle and after a short while returned, and once again entered the vehicle where he handed Agent Jackson a box [R. T. 69]. Agent Jackson opened the box and removed six condoms, each containing a quantity of a tan colored powder [R. T. 64]. These six condoms were introduced into evidence as Government's Exhibit Number 2 [R. T. 82].

After observing the contents of the condoms, Agent Jackson said, "It looks all right, but I couldn't pay \$1050.00 for

it." The defendant inquired, "What could you do?" Agent Jackson stated, "About \$900.00 is the best I can pay for it" [R. T. 69]. This was agreeable to defendant and Agent Jackson then explained that he did not have that much money with him and that he would have to go to his bank to get the money [R. T. 69].

Agent Jackson, the defendant, and Mr. Davis proceeded to Jackson's bank at 9th and Main Streets, Los Angeles, where the defendant was arrested after Agent Jackson gave a pre-arranged signal to other narcotics agents who were on surveillance. Incident to the arrest, the defendant was searched and the six condoms, introduced into evidence as Government's exhibit Number 2B [R. T. 82], were found in the defendant's pocket [R. T. 80].

At no time did the defendant request or obtain from Agent Jackson an order on a form issued for the purpose of selling heroin by the Secretary of the Treasury [R. T. 73].

The contents of the condoms in Government's exhibits One and Two were analyzed and determined to contain heroin [R. T. 104].

Mr. William Davis had been arrested for violating the Federal Narcotic Laws in December 1966 [R. T. 147], but had not been prosecuted as yet [R. T. 154].

Counsel for defendant sought to inquire into the details of the narcotic offense for which Mr. Davis was arrested and was precluded from doing so by the court. The court ruled that "materiality is the key issue; and I can't see where the details

of this offense are material." [R. T. 149].

The defendant took the stand and testified in his own behalf [R. T. 163]. On cross examination, the defendant was asked if he had ever been convicted of a felony involving narcotics [R. T. 178]. A stipulation was then entered into that in 1959, the defendant was convicted of willfully, unlawfully and feloniously selling, furnishing and giving away a narcotic, to wit, heroin [R. T. 179, 180].

An objection had been raised by defendant to the Government's inquiry as to the nature of the felony. However, the objection was overruled. The court pointed out that the defense indicated they would rely on entrapment and that in view of this defense "the prior conviction of a felony may, wholly apart from its impeachment admissibility, have relevance and materiality." The court indicated that when entrapment is raised the jury must consider facts relating to the defendant's disposition, willingness to commit the crime, or whether he was induced or persuaded [R. T. 133].

III

ARGUMENT

TITLE 21, UNITED STATES CODE, SECTION 174 IS CONSTITUTIONAL

A. The provision which reads "... unexplained possession of a narcotic drug is sufficient evidence to authorize a conviction . . . " does not shift or change the burden of proof.

The statute and the presumption merely have the effect of shifting to the defendant the burden of going forward with evidence, i. e. with his defense. The burden of proof is always with the Government to prove the defendant's guilt beyond a reasonable doubt.

Roviard v. United States,

353 U. S. 53, 63 (1957);

Chavez v. United States, 343 F. 2d 85

(9th Cir. 1965);

Gonzalez v. United States, 162 F. 2d 870

(9th Cir. 1947).

B. The provision which reads "... unexplained possession of a narcotic drug is sufficient evidence to authorize . . . " does not deprive the defendant of his Fifth Amendment right against self-incrimination. The defendant's right to remain silent is not infringed upon.

The defendant is neither required nor forbidden to testify by Title 21, United States Code, §174. The argument that this

section violates the defendant's Fifth Amendment rights has been repeatedly rejected for many years. Indeed in Yee Hem v. United States, 268 U. S. 178, 185 (1925), the Supreme Court held:

"The point that the practical effect of the statute creating the presumption is to compel the accused person to be a witness against himself may be put aside with slight discussion. The statute compels nothing. It does no more than to make possession of the prohibited article prima facie evidence of guilt. It leaves the accused entirely free to testify or not as he chooses. If the accused happens to be the only repository of the facts necessary to negative the presumption arising from his possession, that is a misfortune which the statute under review does not create but which is inherent in the case. The same situation might present itself if there were no statutory presumption and a prima facie case of concealment with knowledge of unlawful importation were made by the evidence. The necessity of an explanation by the accused would be quite as compelling in that case as in this; but the constraint upon him to give testimony would arise there, as it arises here, simply from the force of circumstances and not from any form of compulsion forbidden by the Constitution."

In United States v. Galney, 380 U.S. 63, 70 (1965), the District Court instructed the jury regarding the statutory provisions authorizing the inference of guilt from the defendant's unexplained presence at a still site in a case where the defendant was convicted of illegal possession of a still. The Circuit Court held:

"We do not consider that the single phrase 'unless the defendant by the evidence in the case and by proven facts and circumstances explains such presence to the satisfaction of the jury' can be fairly understood as a comment on the petitioner's failure to testify."

In Orojo-Vasquez et al. v. United States, 344 F. 2d 827 (9th Cir. 1965), the court pointed out that the contention that the provision in Title 21, United States Code, §174 requiring the defendant to explain possession of narcotics is unconstitutional and violates the defendant's Fifth Amendment rights against self-incrimination had been repeatedly held to have been without merit. See also:

Brown v. United States, 370 F. 2d 374 (9th Cir. 1963);

Agobian v. United States, 323 F. 2d 693 (9th Cir. 1963);

Cellino v. United States, 276 F. 2d 941 (9th Cir. 1960);

Yee Hem v. United States, supra.

C. The phrase "to the satisfaction of the jury" is not unconstitutional because of uncertainty or vagueness. This phrase is not unconstitutional on the grounds asserted that the jury is authorized to adjudge its satisfaction of an explanation given upon its own whim or reason without any standard or measurement and thus unlawfully delegates a legislative function.

In Gonzalez v. United States, supra at 871, the court held that:

" . . . satisfaction of the jury, as to the explanation, turns upon whether or not the possession was within the exceptions provided in the statutes. The standard is plainly set forth."

See also:

Brown v. United States, supra;

Chavez v. United States, supra.

D. This section does not deprive the defendant of his right to equal protection of the law. As previously cited, Title 21, United States Code, has consistently been held to be constitutional. It is respectfully submitted that there is no merit to the defendant's contention that by virtue of the statute and the presumption he is deprived of equal protection in that he must prove

or explain to the satisfaction of the jury.

E. There is a rational basis between the fact proved (possession of heroin) and the fact presumed (knowledge of illegal importation). The Supreme Court of the United States, as well as the Ninth Circuit, has repeatedly held that there is a rational basis for the statutory presumption in Title 21, United States Code, §174 and that this presumption does not violate the defendant's constitutional rights.

Yee Hem v. United States, supra;

United States v. Gainey, supra;

Ramirez v. United States, 350 F. 2d 306 (9th Cir. 1965);

Pool v. United States, 344 F. 2d 943 (9th Cir. 1965);

Morales v. United States, 344 F. 2d 846 (9th Cir. 1965).

IT WAS NOT REVERSIBLE ERROR FOR THE TRIAL COURT TO ALLOW THE FACT OF PRIOR CONVICTIONS, EVEN IF FOR THE SAME TYPE OFFENSE, TO BE USED TO IMPEACH THE DEFENDANT'S CREDIBILITY.

Defendant contends that informing the jury that he previously had been convicted for selling heroin was so prejudicial as to deny him due process of law.

There is little doubt that from the time that the defendant first claimed he was "framed" by an informer and a narcotics agent [R. T. 32] and defense counsel opened argument by stating "the defense is one of entrapment" [R. T. 56], through the examination of the allegedly entrapping informant [R. T. 146-164], and cross examination of the narcotics agent [R. T. 82-92], the presentation of Dr. Mittman to testify to the allegedly easily overborne weak will of the defendant [R. T. 125, 127-29], and through defendant's own testimony [R. T. 164-75], the defense wholly revolved around the issue of entrapment. In this context, and in line with the government's burden of proof on the entrapment issue, the prior conviction was admitted [R. T. 131-134]

Once the defense raises the entrapment issue, the government may conduct a searching inquiry into the defendant's past in order to show predisposition of the defendant for this illegal type of behavior and the attendant reasonableness of the government's activities. Sherman v. United States, 356 U.S. 369 (1958); Sorrells v. United States, 287 U.S. 435 (1932). There is

no question but that, not only was the prior conviction for sale of heroin admissible as strong evidence of predisposition to commit such acts, but the government was under an affirmative duty to present this type of evidence or risk acquittal based on entrapment. See Notaro v. United States, 363 F.2d 169 (9th Cir. 1966).

Defendant's trial counsel placed his faith in the entrapment issue. Since the defendant apparently denied willful connection with narcotics and hardly showed government importuning [R. T. 186-190], it became evident at the end of the presentation of evidence that this defense was not very propitious. Nevertheless, prompted by defense counsel's arguments, the trial judge agreed that the entrapment instruction should be given [R. T. 213]. Soon after this ruling, defendant's counsel stated:

"To tell you the truth, your Honor, the way this case has developed and the way the evidence has come in, I am not totally convinced that the -- and I know this is going to sound funny -- entrapment instruction should be given at all.

"I have had time to think about it, and I have reflected about it; and you have had time to think about it and change your mind the other way. But the more I think about it -- . . .

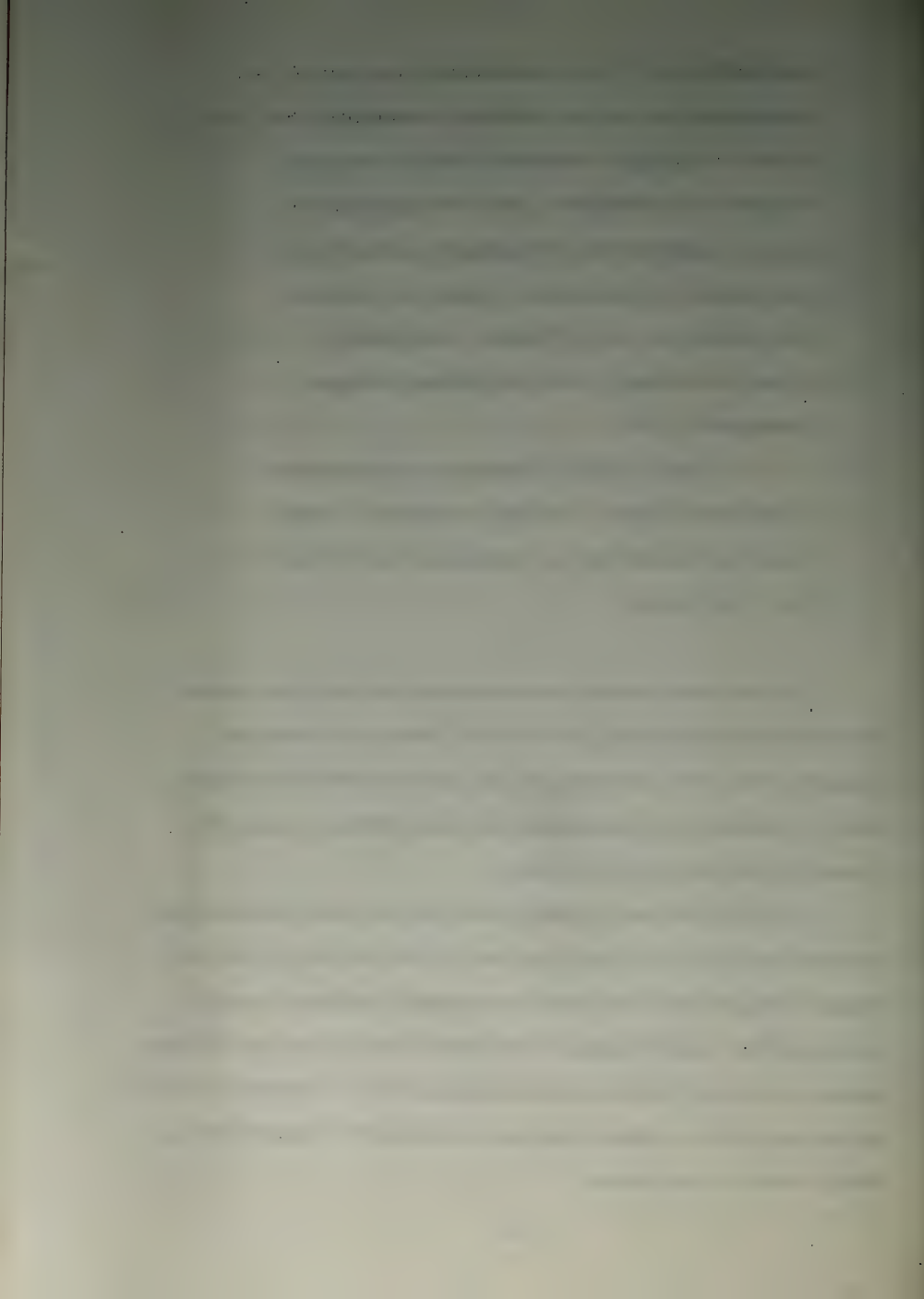
"Well, I will tell you -- and I am being very frank with the court, and also with Mr. Gargaro -- I feel that the previous felony conviction for

selling heroin, if it is considered by the jury on anything except the defendant's credibility. I think it is going to completely destroy any case that we have presented. And I am not sure in my own mind that the entrapment instruction is that helpful to the defendant under the facts as they came out. Very frankly, I am going to argue knowledge. I am not planning to argue entrapment at all.

"THE COURT: Then you are up against a decision to make, and that is whether to withdraw the request for an entrapment instruction."
[R. T. 215-216].

The defense counsel then requested the court not to give the entrapment instruction [R. T. 217]. The court complied, noting that the prior conviction would now have effect only on the issue of credibility, a proposition to which defense counsel expressed agreement [R. T. 21, 220].

Although defense counsel earlier had objected to admitting evidence that the prior conviction was for the sale of heroin, the changed complexion of the case, prompted by defense counsel, compelled the judge to assess this question in the entirely different context of the case without the entrapment issue. Defense counsel's agreement with the judge's decision militates for a finding that no timely objection was made.



Once the defendant takes the stand, the fact of his prior convictions may be used to impeach his credibility. See Spencer v. Texas, 385 U.S. 554 (1967).

Recently the United States Court of Appeals for the District of Columbia circuit enunciated what has become probably the strictest rule among the circuits on admissibility of prior convictions. Luck v. United States, 348 F.2d 763 (D.C. Cir. 1965). Luck held that the court is not required to always allow impeachment by prior convictions. Rather, sound judicial discretion must be applied to weigh the prejudicial effect of impeachment against the probative relevance of the prior conviction to the issue of credibility; a discretion that "is to be accorded a respect appropriately reflective of the inescapable remoteness of appellate review." 348 F.2d at 769. Subsequent to Luck, that court interpreted the applicable rule to mean that for the trial court to disallow a prior conviction the court must find that the prejudice "far outweighs" the probative value. Gordon v. United States, 383 F.2d 936, 939 (D.C. Cir. 1967).

Thus, even under the strict rule, it is at least a matter of judicial discretion to allow impeachment by prior convictions. That this impeachment is proper is well-established in this Court. Singleton v. United States, 381 F.2d 1, 4 (9th Cir.), cert. denied 389 U.S. 1024 (1967); Helberg v. United States, 365 F.2d 314, 316 (9th Cir. 1966), cert. denied 385 U.S. 1010 (1967); Bohol v. United States, 227 F.2d 330, 331 (9th Cir. 1955); Shockley v. United States, 166 F.2d 704, 717 (9th Cir.), cert. denied 334



U.S. 850 (1948); United States v. Cisneros, 191 F. Supp. 924, 927 (N. D. Cal. 1961), *aff'd* 322 F.2d 948 (9th Cir. 1963).

Applying the rules on impeachment to this case, defendant's contentions must fail, even under the strict view of admissibility. Thus, in a case where the entrapment defense fell through at the end of the evidence and the judge ruled that several prior narcotics convictions were admissible to impeach a defendant in a narcotics case, the United States Court of Appeals for the District of Columbia circuit upheld the trial judge's exercise of discretion. Brooke v. United States, 385 F.2d 279 (D.C. Cir. 1967). And the fact that the prior conviction was for the same, or almost the same offense as the one at trial does not preclude its admissibility to impeach. See Williams v. United States, 394 F.2d 957 (D.C. Cir. 1968) (robbery); Gordon v. United States, *supra* (robbery); Brooke v. United States, *supra* (narcotics); Beam v. United States, 378 F.2d 937 (5th Cir. 1967) (Possession of non tax-paid whiskey). And impeachment by similar prior convictions has long been allowed by this court. Bohol v. United States, *supra* (narcotics); Shockley v. United States, *supra* (murder); Cisneros v. United States, *supra* (narcotics).

Nor does the fact that the acts were remote in time although a factor to consider, preclude the exercise of this discretion. Palumbo v. United States, 401 F.2d 270 (2d Cir. 1968) (several crimes extending back 38 years); United States v. Plata, 361 F.2d 958 (7th Cir.), *cert. denied* 385 U.S. 841 (1966) (eleven-year old

conviction); United States v. Bell, 351 F. 2d 868 (8th Cir. 1965), cert. denied 383 U. S. 947 (1966) (twenty-year old conviction).

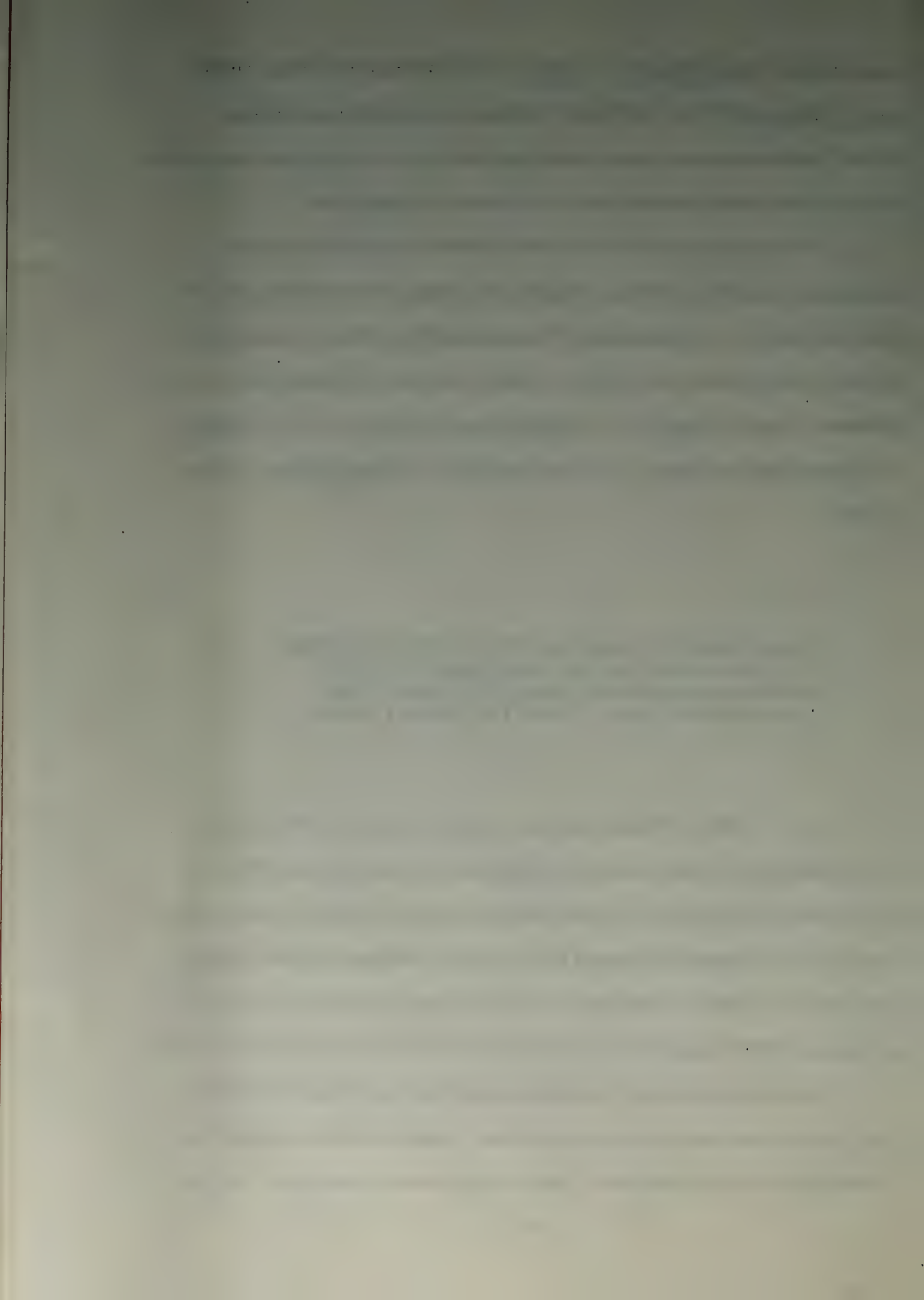
Thus, in the present case, an eight-year old convictions admission could hardly have equated with an abuse of discretion.

In a case such as this, which even the defense counsel eventually posed as simply raising the issue of credibility [R. T. 225-26, 231], it is especially compelling that all avenues be explored which would shed light on which of the witnesses was to be believed. See Palumbo v. United States, supra, at 274, Brooke v. United States, supra, at 280; Gordon v. United States, supra, at 941.

THE COURT'S LIMITATION ON THE SCOPE
OF EXAMINATION BY DEFENSE COUNSEL
OF WILLIAM DAVIS DID NOT DENY THE
DEFENDANT ANY CONSTITUTIONAL RIGHT.

A. Mr. William Davis, the Government informer in the instant case, was called as a witness by the defense [R. T. 146]. Mr. Davis testified that he had been arrested in December, 1966, for a narcotic offense [R. T. 147]. Defense counsel asked Mr. Davis to relate what had occurred that caused him to be arrested. The court then interposed its own objection [R. T. 147]

In a discussion at the bench outside the presence of the jury there was mention of the witness' right to silence regarding a pending case against him. More significantly however, is the



fact that the court stated such an inquiry was immaterial [R. T. 148]. The court said, "I have a real problem about the immateriality of that detail . . . " [R. T. 149].

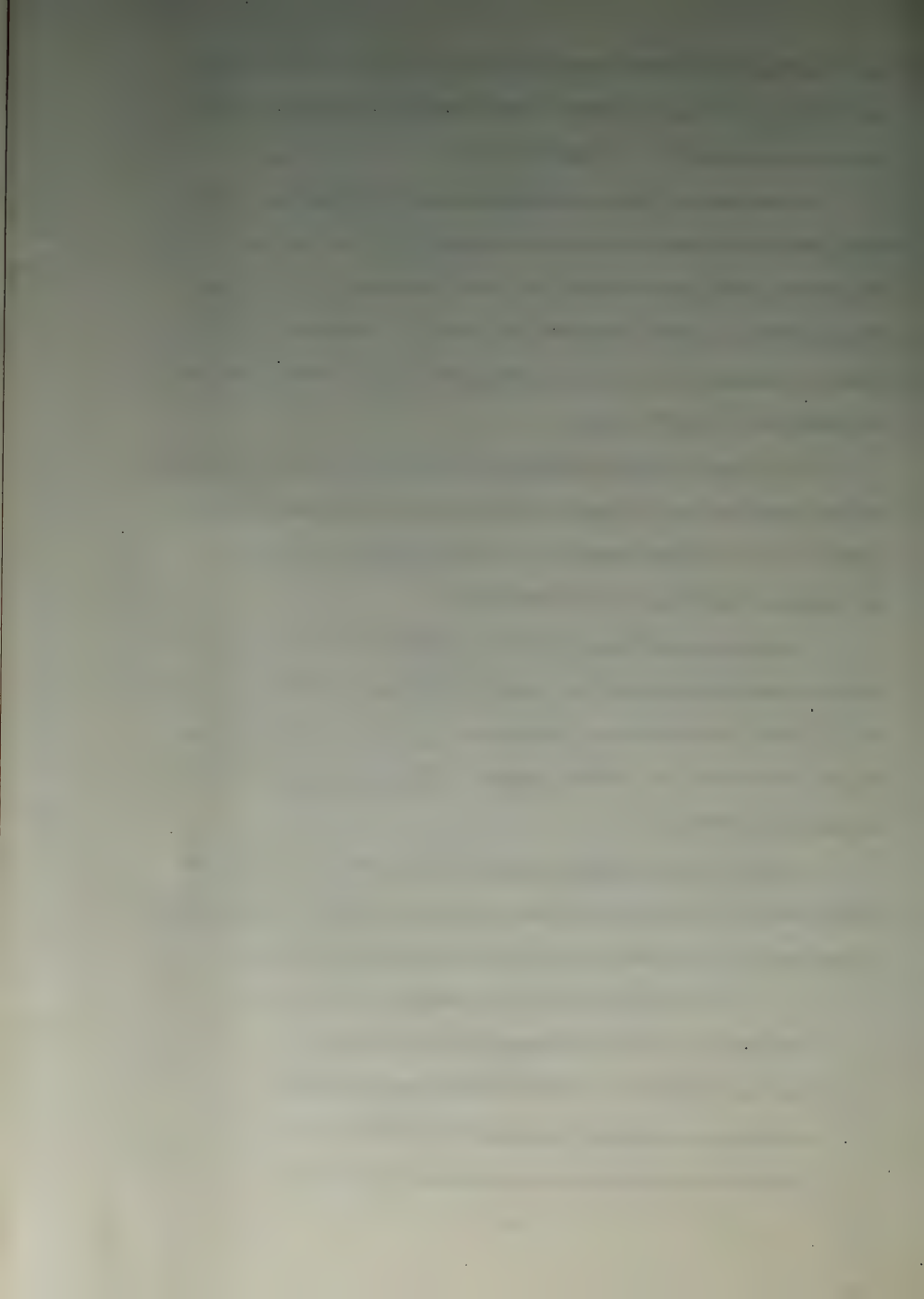
When counsel for the defendant asserted that his client was being prejudiced due to the court's intent to protect the rights of the witness, the court pointed out with reference to the circumstances that led to the arrest of Mr. Davis: "The immateriality is the key issue and I can't see where the details of this offense are material." [R. T. 149].

It is clear that this situation is merely the court's imposing its own objection on the basis of the line of questioning being immaterial. In so doing there was no infringement of any sort on any constitutional right of the defendant.

The ruling on the material or immaterial nature of evidence is within the discretion of the court. The court will be reversed only if there is an abuse of discretion. Mims v. United States, 254 F. 2d 654 (9th Cir. 1958); Wilson v. United States, 250 F. 2d 312 (9th Cir. 1958).

Mims v. United States, supra, was a case involving the sale of heroin in which the District Court curtailed the questioning of a witness. On appeal the Circuit Court held (P. 658):

"The District Court's refusal to permit the defendant to 'try' the Reverend Mr. Powell, a police informant, because Mims was supposedly unhappy in engaging in business with him, is alleged to be fatal error requiring reversal of



defendant's conviction.

"We think not. Defendant was permitted to tell his 'valid reason' as to why he went to the premises where the sale took place. Mr. Powell was present in the courtroom at the request of the Government, though not called as a Government witness. Defendant could have called him had he desired. The discretion of a trial court is large as to how and when bias may be proved and what collateral evidence is material. (Emphasis We do not think the trial court abused that discretion . . . "

The instant case involves nothing more than the court properly exercising its discretion in ruling that the intended line of questioning directed to Mr. Davis was not material.

B. There was no error precluding the defendant from treating Mr. Davis as a hostile witness and therefore taking him on cross examination.

Before permitting counsel to treat his own witness as if on cross examination the court must be satisfied that the witness is in fact hostile or did in fact render testimony which constituted surprise. Such a decision is strictly within the court's discretion and of course will be grounds for reversal only if there is an abuse of discretion. See United States v. Krahanes, 317 F. 2d 459 (2nd Cir. 1963); Breber v. United States, 276 F. 2d 709 (9th Cir. 1960).

In the instant case the defense called as its witness Mr

William Davis, the Government informer. Mr. Davis testified that he was arrested for narcotics in December, 1966, that he was released on bond several days after being arrested and that he became an informer for the Federal Bureau of Narcotics [R. T. 147-157]. After the attorney for the Government objected to defense counsel asking Mr. Davis if he framed the defendant, counsel approached the bench for a brief discussion. Counsel for the defense asserted that Mr. Davis was a hostile witness and therefore he should be able to cross examine him [R. T. 158].

The court stated, "I have seen no evidence of hostility . . . " Defense counsel suggested that the mere fact that Mr. Davis was an informer against the defendant was sufficient. However, the court held otherwise and stated, "I have my doubts about it. We will rule on the individual questions and objections as they are presented . . . " From that point on there was not even one objection by the Government which was sustained by the court with reference to the examination of Mr. Davis by defense counsel [R. T. 159-162]. Therefore, even if the court's ruling was error it surely was harmless since it had no effect at all on the subsequent examination conducted by counsel in which all questions posed were answered without one objection being sustained.

In effect the court's ruling was not final. The ruling was that each individual question would be considered and if there was any indication of hostility defense counsel would have been allowed to proceed as if on cross examination.

FAILURE OF THE GOVERNMENT TO DIS-
CLOSE IDENTITY OF INFORMER PRIOR
TO TRIAL DOES NOT VIOLATE DEFEND-
ANT'S CONSTITUTIONAL RIGHTS.

The defendant contends he was deprived of a fair trial because the government failed to inform defense counsel prior to trial of the identity of the informant, Davis. This contention is somewhat startling in view of the fact that the defendant had known Davis very well for seven years [R. T. 156], and knew at all times that he was a precipient witness. Moreover, all that defendant can refer to in order to show a request for this information is defense counsel's assertion that he asked the prosecution for the informant's name at some unspecified time. [Brief for appellant at 11]. No motion or formal request of any kind was made, precluding this issue on appeal. That no motion was made is understandable in light of the fact that defense counsel could simply have asked his client for the informant's name. The government was no more knowledgeable in this matter than was the defendant. In fact, the informant was eventually called as a defense witness [R. T. 146].

Another defect in defendant's contention is that, except for vague allusions as to possible aid, defendant does not show how he was prejudiced by this alleged defect.

Even if we were to stretch logic and assume that a proper request was made that this information was necessary in order to discover identity, and that prejudice resulted from non-disclosure

statute and case law contradict defendant's claimed right to this information.

Title 18, United States Code, §3432 provides that the government must provide a list of witnesses only where the defendant is charged with treason or other capital offense. It has thus long and unanimously been held that the Government does not have to reveal its witnesses in the usual non-capital case such as this one:

United States v. Van Duzee, 140 U. S. 169, 173
(1891);

United States v. Chase, 372 F. 2d 453, 466
(4th Cir. 1967), cert. denied 387 U. S. 907
(1967);

Cordova v. United States, 303 F. 2d 454 (10th Cir.
1962);

Dean v. United States, 265 F. 2d 544 (8th Cir. 1959).
Hamer v. United States, 259 F. 2d 274, 279 (9th
Cir. 1958);

Brown v. Johnston, 126 F. 2d 727 (9th Cir. 1942).
cert. denied 317 U. S. 627 (1943);

United States v. Westmoreland, 41 F. R. D. 419.
427 (S. D. Ind. 1967);

Smith v. United States, 216 F. Supp. 809, 812
(S. D. Cal. 1961);

United States v. Schneiderman, 104 F. Supp. 405.
408 (S. D. Cal. 1952).

A logical inference arises that since Congress so limited the witness list requirement, they intended that in other cases the requirement is not applicable. See United States v. Margeson, 261 F. Supp. 628 (E. D. Pa. 1966). Thus, as this Court has pointed out, if this limit is to be changed, the remedy is with Congress and not with the courts. Hamer v. United States, 259 F. 2d 274, 279 (9th Cir. 1958).

The primary justification for non-disclosure lies in the fact that, in any criminal case, witnesses are subject to great pressures from those who feel threatened by their testimony. See United States v. Estep, 151 F. Supp. 668, 673 (N. D. Tex. 1957); United States v. Bryson, 16 F. R. D. 431, 436 (N. D. Cal. 1954). A fortiori, in this case, where an informant was to testify against an old acquaintance, the possibility of intimidation leading to harm or refusal to testify was significant. See United States v. Estep, supra, at 673.

Deliberate suppression of evidence which might clearly operate in favor of a defendant would constitute a violation of due process. Thus where witnesses are hidden by the government and it is shown that their testimony may well be exculpatory, such suppression of evidence by the government may be forbidden in an appropriate case. Compare Giles v. Maryland, 386 U. S. 66 (1967); Brady v. Maryland, 373 U. S. 83 (1963); Lessard v. Dickson, 394 F. 2d 88 (9th Cir. 1968); Lee v. United States, 388 F. 2d 737 (9th Cir. 1968); Thomas v. United States, 343 F. 2d 49 (9th Cir. 1965). No suppression nor exculpatory evidence

was present in this case.

Discovery of evidence in the hands of the government is being liberalized to an extent, but in no way is this trend, if it be such, directed towards the production of witness lists. Of the cases cited by the defendant, Miller v. Pate concerns the knowing use of fabricated evidence; Giles and Brady relate to suppression of exculpatory evidence, and the Dennis decision rests on an interpretation of an unrelated procedural rule limited to a showing of "particularized need" for Grand Jury minutes. Dennis v. United States, 384 U.S. 855 (1966). In no way do these cases even intimate that discovery of witnesses such as Davis is constitutionally required.

IV

CONCLUSION

For the foregoing reasons it is respectfully submitted
that the decision of the trial court should be affirmed.

Respectfully submitted,

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NO. 22759 ✓

United States

Court of Appeals

for the Ninth Circuit

WALTER WILLIAM JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

*Upon Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF OF APPELLEE

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**United States
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*Upon Appeal from the Judgment of the United States
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BRIEF OF APPELLEE

COUNTER-STATEMENT OF THE CASE¹

Defendant's statement of facts is generally sufficient except as specifically noted under appropriate points in our argument.

¹ TR denotes Transcript of Proceedings; D. Br. denotes Defendant's Brief; R denotes record on appeal.

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**United States
Court of Appeals**
for the Ninth Circuit

WALTER WILLIAM JOHNSON,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

*Upon Appeal from the Judgment of the United States
District Court for the District of Oregon*

BRIEF OF APPELLEE

COUNTER-STATEMENT OF THE CASE¹

Defendant's statement of facts is generally sufficient except as specifically noted under appropriate points in our argument.

¹ TR denotes Transcript of Proceedings; D. Br. denotes Defendant's Brief. R denotes record on appeal.

ARGUMENT

THE STATUTORY PRESUMPTION CONTAINED IN TITLE 21, SECTION 174, UNITED STATES CODE, IS CONSTITUTIONAL BEING NEITHER ARBITRARY OR VIOLATIVE OF DUE PROCESS.

Defendant contends the statutory presumption contained in Title 21, Section 174, United States Code, authorizing conviction on the basis of possession of heroin alone lacks a rational connection between the facts proved and the facts presumed and is thus arbitrary and violative of due process (D. Br. 3).

The cases rejecting defendant's assignment are legion. See for example: *Yee Hem v. U.S.*, 268 U.S. 178 (1925); *Brandford v. U.S.*, 271 F.2d 58 (9th Cir., 1959); *Hunter v. U.S.*, 339 F.2d 425 (9th Cir., 1964); *Pool v. U.S.*, 344 F.2d 944 (9th Cir., 1965); *Agobian v. U.S.*, 323 F.2d 693 (9th Cir., 1963); *Caudillo v. U.S.*, 253 F.2d 513 (9th Cir., 1958); *McIntyre v. U.S.*, 380 F.2d 746 (9th Cir., 1967), U.S. cert. den. in 389 U.S. 952; *Morales v. U.S.*, 344 F.2d 846 (9th Cir., 1965); *Erwing v. U.S.*, 323 F.2d 674 (9th Cir., 1963); and *Juvera v. U.S.*, 378 F.2d 433 (9th Cir., 1967).

Defendant's reliance on *Tot v. U.S.*, 319 U.S. 463 (1943) is similarly misplaced. *Caudillo v. U.S.* 253

F.2d 513 (9th Cir., 1958); *Leary v. U.S.*, 383 F.2d 851 868-869 (5th Cir., 1967).

The fact that defendant denied purchasing the capsules found on his person, knowing they were heroin, or had been imported is not controlling (D. Br. 2). It is settled that the mere denial of importation, or knowledge thereof, without more does not, as a matter of law, negative the statutory presumption. *Chavez v. U.S.*, 343 F.2d 85, 89-90 (9th Cir., 1965); *U.S. v. Norton*, 310 F.2d 718, 719 (2nd Cir., 1962); *McIntyre v. U.S.*, 380 F.2d 746 (9th Cir., 1967)

It is similarly clear the jury was not required to accept defendant's unconvincing testimony, particularly in view of his statement that he knew the capsules found in his shirt and trouser pockets contained some type of narcotics (D. Br. 1; TR 55, 76, 77, 80-81).

It must also be pointed out that defendant has chosen to restrict his appeal to an attack upon his conviction under Count I of the Indictment which charges a violation of Title 21, Section 174, United States Code (D. Br. 3, 6; R. 1, 9). Defendant was committed to the custody of the Attorney General on this count for a period of ten (10) years to run concurrently with a sentence of five (5) years imposed upon his conviction under Count II of the Indictment which

charges a violation of Title 26, Section 4704(a), United States Code (R. 1, 9). It is therefore clear, irrespective of the Court's decision on the constitutionality of statutory presumption in Title 21, Section 174, United States Code, the conviction on Count II must either be affirmed or the case remanded solely for the purpose of resentencing.

CONCLUSION

WHEREFORE, on the basis of the above and foregoing, it is respectfully urged the judgment of conviction be affirmed.

Respectfully submitted,

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*United States Attorney
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Assistant United States Attorney

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

CHARLES H. TURNER

*Assistant United States Attorney
Of Attorneys for Appellee*

No. 22762

JUN 12 1963

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SUN VALLEY DISPOSAL CO., INC., a corporation,

Appellant,

vs.

SILVER STATE DISPOSAL CO., CLARK SANITATION, INC.,
DISPOSAL TRANSPORTATION, INC., HENDERSON DIS-
POSAL SERVICE, INC., DISPOSAL INVESTMENTS, INC.,
LESTER L. LAFORTUNE, JOHN ISOLA, AND ALFRED
ISOLA,

Appellees.

An Appeal From a Summary Judgment

OPENING BRIEF FOR APPELLANT.

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JUN 17 1963

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No. 22762

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SUN VALLEY DISPOSAL CO., INC., a corporation,

Appellant,

vs.

SILVER STATE DISPOSAL CO., CLARK SANITATION, INC.,
DISPOSAL TRANSPORTATION, INC., HENDERSON DIS-
POSAL SERVICE, INC., DISPOSAL INVESTMENTS, INC.,
LESTER L. LAFORTUNE, JOHN ISOLA, AND ALFRED
ISOLA,

Appellees.

An Appeal From a Summary Judgment.

OPENING BRIEF FOR APPELLANT.

STATEMENT OF JURISDICTION.

These proceedings were instituted by appellant against appellees under the federal antitrust laws, specifically Title 15, U.S.C. Section 15, being part of the Act of Congress of July 2, 1890, c. 649, 26 Stat. 209, as amended, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies". A summary judgment was entered in favor of appellees and against appellant by the Honorable Bruce

R. Thompson, in the United States District Court for the District of Nevada [R. 1091].¹ Appellant herein appealed from the summary judgment [R. 1101]. This Court has jurisdiction to review the judgment under 28 U.S.C., Secs. 1291 and 1294(1).

STATEMENT OF THE CASE.

A. NATURE OF THE CASE.

Appellant claims that the defendants-appellees have violated Sections 1 and 2 of the Sherman Act, 15 U.S.C.A., Sections 1 and 2. Appellant engaged in garbage pick-up and disposal service and container rental activity [Tr. 1121-24 to 1121-26]. Appellant seeks treble damages under Section 4 of the Clayton Act, 15 U.S.C.A., Section 15, by reason of the destruction of its business, which it conducted from about January 1, 1961 to April 4, 1965. Appellant is also the assignee of R. J. Collet, the owner of equipment used by appellant exclusively in the conduct of its business, and as assignee claims damages for the compulsory sale of equipment at distress prices [R. 109, 110, 128, 129, 131, 132].

¹The Clerk's record is referred to herein as "R . . .". The Clerk's record includes the depositions and exhibits therein. The record is paginated continuously from R. 1 to R. 1120. The record thereafter includes 626 pages of pleadings filed by appellant on June 13, 1966 in opposition to the motion for summary judgment, the first page of which bears the numbers "1121" and "1" and the subsequent pages of which bear only the numbers "2" to "626", inclusive; by reason of this pagination, the said 626 pages are referred to herein as "R. 1121-1 to R. 1121-626, inclusive". The record thereafter resumes at R. 1122 with the deposition of Max Chason filed December 28, 1965, and continues thereafter until R. 6945.

Section 4 of the Clayton Act, October 14, 1914, Chapter 323, Section 4, 38 Stat. 731, 15 U.S. Code, Section 15 states:

"That any person who shall be injured in his business or property by reason of anything forbidden in the Anti-Trust Laws may sue therefore in the District Court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount of controversy and shall recover three-fold the damages by him sustained, and the costs of suit, including a reasonable attorney's fee."

Sections 1 and 2 of the Sherman Act provide, Sherman Act, Sections 1 and 2, July 2, 1890, chapter 647, Sections 1, 2, 26 Stat. 209, 15 U.S.C., Sections 1, 2:

"Section 1: Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several states, or with foreign nations, is hereby declared illegal . . .

"Section 2: Every person who shall monopolize or attempt to monopolize or combine or conspire with any person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

B. THE PLEADINGS.

The Amended Complaint charges, *inter alia*, that the defendants and others acting in concert with them have entered into contracts, combinations and conspiracies to restrain unreasonably, have attempted to monopolize,

have combined and conspired to monopolize and have monopolized interstate trade and commerce in violation of Sections 1 and 2 of the Sherman Act [R. 120]. The Amended Complaint further alleges the specific objectives and the means utilized to achieve said objectives [R. 121-127]. The Amended Complaint further alleges the quantitative and qualitative nature of the interstate trade and commerce [R. 111-116].

The defendants filed a motion for summary judgment on the grounds that no genuine factual issues existed and that: (1) the acts complained of did not involve interstate commerce or have a substantial and direct effect on interstate commerce; or (2) the acts complained of were brought about, authorized, sanctioned and approved by an act of the legislature of the State of Nevada [R. 405-406].

The appellant thereafter engaged in extensive pretrial discovery, as a result of which the record in opposition to the motion for summary judgment contains depositions, affidavits, answers to interrogatories, admissions and pleadings.

C. THE PARTIES.

Appellant-plaintiff, Sun Valley Disposal Co., Inc. (hereinafter called "Sun Valley") engaged in a garbage pick-up and disposal service and container rental activity in the unincorporated area² of Clark County, Nevada, from January 1, 1961 to April 4, 1965.

²The incorporated cities located within Clark County, Nevada, were Las Vegas, North Las Vegas, Henderson and Boulder City.

Silver State Disposal Company (hereinafter called "Silver State Disposal") conducted a garbage pick-up and disposal service in the City of Las Vegas under an exclusive contract from the City of Las Vegas and operated a garbage dumpsite in the unincorporated area of Clark County, Nevada.

Clark Sanitation, Inc. (hereinafter called "Clark Sanitation") conducted a garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada, and since April 4, 1965 had held an exclusive franchise in Clark County, Nevada, for that purpose.

Disposal Transportation, Inc. (hereinafter called "Disposal Transportation") conducted a garbage pick-up and disposal service in the City of North Las Vegas under an exclusive contract from the City of North Las Vegas.

Henderson Disposal Service, Inc. (hereinafter called "Henderson Disposal") conducted a garbage pick-up and disposal service in the cities of Henderson, Nevada, Boulder City, Nevada, and Page, Arizona.

Disposal Investment, Inc. (hereinafter called "Disposal Investment") engaged in activities related to the garbage pick-up and disposal services conducted by Silver State Disposal, Clark Sanitation, Disposal Transportation and Henderson Disposal, including the sale and rental of containers.

Lester L. LaFortune, John Isola and Alfred Isola, have acted as officers and directors of Silver State Disposal, Clark Sanitation, Disposal Transportation, Henderson Disposal and Disposal Investments.

D. STATEMENT OF FACTS.

1. Container Merchandising as a Separate Line of Interstate Commerce Affected by the Elimination of the Depressive Influence of Independents on Rental Rates.

(a) Container Rental Activity as a Separate and Distinct Operation:

“The container business” was the phrase used by an equipment distributor to describe the operations engaged in throughout the country whereby rentals were charged for containers used by customers of the garbage pick-up and disposal service [R. 6460]. Prior to 1958 Southern Nevada Disposal Service, Inc., which was controlled by one Max Chason, leased containers of one cubic yard capacity to customer in the City of Las Vegas, City of North Las Vegas and the unincorporated area of Clark County, Nevada [R. 4835-4839; 4847]. In January 1958, Lester L. LaFortune acquired an option to purchase Chason’s controlling stock in Southern Nevada Disposal Service, Inc.; in April 1958, three corporations were formed, including Disposal Investments, Inc.; in May 1958, the option was exercised [R. 176]. Upon its formation as a corporation, Disposal Investments were designated as the merchandising company to perform the function of renting containers [R. 4842-4844]. From the date of its inception until the time of the ligation, Disposal Investments had been engaged in the sale and leasing of containers to businesses and residents located within Clark County, Nevada [R. 181].

In 1959, Disposal Investments acquired six additional one-yard containers, in 1961 it acquired 175 additional one-yard containers, and by September 30, 1965 it had acquired a total of 2,144 containers [R. 183, 6461]. After Sun Valley commenced its operation in January 1961, Sun Valley rented two-yard and three-yard containers to its customers in the unincorporated area of Clark County, Nevada, which led Disposal Investments as a competitor to increase the number of its containers in sizes larger than one-yard capacity [R. 4851-4852, 5713-5714, 5716].

Disposal Investments rented containers directly to apartment houses, restaurants and motels, to which it billed for the rentals separately [R. 4904-4907]. Disposal Investments had 1,033 container accounts [R. 183]. One of the accounts of Disposal Investments was Clark Sanitation, Inc., an affiliated company, which in turn leased containers to approximately 90 container accounts in the unincorporated area of Clark County, Nevada, including the Strip hotels [R. 708-712, 4906]. Sun Valley leased containers to apartment houses, motels and Strip hotels in the unincorporated area of Clark County, Nevada [R. 4707].

Disposal Investments has maintained a uniform container rental rate structure throughout Clark County over the years [R. 827, 5712]:

Size	Monthly Rate
1 cubic yard capacity	\$ 7.50
1½ cubic yard capacity	8.75
2 cubic yard capacity	10.00
3 cubic yard capacity	12.50
4 cubic yard capacity	15.00

Container rental rates were unregulated by any governmental body [R. 4838]. Disposal Investments maintained a separate bookkeeping account for container rental income [R. 5787]. Its tax returns were never consolidated with those of the garbage pick-up and disposal service companies [R. 5819-5820]. Its financial statements were separately reported [R. 1121-41 to 69].

Since there was delivery and maintenance expense involving a workshop for repairing containers in order to engage in container rental activity, it was necessary to build up a volume container business to make a profit [R. 4882-4883].

In the defendants' consolidated financial statement for the year ended September 30, 1964, the following comment appears [R. 1121-83]:

"The only capital outlay of any substantial proportions for depreciable operating assets during the year under review was made by Disposal Investments, Inc., which invested \$49,389.50 in additional containers for leasing. The leasing of containers has become a large volume operation, and accounted for 34.817% of the gross revenue and 62.998% of the gross operating prof-

it before administrative expense of Disposal Investments, Inc. for the current year. The following is a study of the container rental operations for the years ending September 30, 1963 and 1964:

	Year Ended 9/30/63	Year Ended 9 30 64
Gross revenue from container rentals	\$72,874.46	\$136,808.39
Rental expenses before depreciation	8,128.67	20,974.13
Net rental income before depreciation	64,745.79	115,834.26
Provision for depreciation of containers	28,487.23	38,917.52
Net container rental income	\$36,258.56	\$ 76,916.74
Delivery and maintenance labor component of above expenses	\$ 6,169.67	\$ 11,923.52
Net rental income return on cost investment in containers (valued at year-end)	25.235%	39.984%

Although it was necessary to build up a volume container business to make a profit, manufacturers and distributors did sell containers directly to certain Las Vegas garbage pick-up customers who had Disposal Investments remove its containers; and to that extent the manufacturers and distributors competed with Disposal Investments [R. 4895-4897].

This led to an application by Disposal Investments for a container franchise in the City of Las Vegas, which was the subject of a memorandum from the City Attorney to the Mayor and Board of Commissioners of the City of Las Vegas rejecting the application [R. 996-997].

The parties stipulated that Disposal Investments, Inc. prepared a document dated June 22, 1966 addressed to the City Commissioners of Las Vegas [R. 830, 822-827]. In a pertinent part of that document, Disposal Investments represented as follows: That containers sold and leased within the city limits of Las Vegas accrued revenue to Disposal Investments [R. 823]; that it desired an exclusive contract or franchise to supply containers by lease or sale in Las Vegas [R. 824]; that a growth factor of containers placed within the city of Las Vegas, Nevada, based upon the average yearly growth during the years ended September 30, 1962 to September 30, 1965, was 43.7% per year and a conservative estimate would be for the future a 15% annual growth factor for containers [R. 826]; that billing for containers leased within the City of Las Vegas for the month of May 1966 was \$9,047.50 [R. 287].

The following data shows the amount of container business of Disposal Investments [R. 171, 45, 50, 55, 59, 65, 69]:

Year	Gross Rental Revenue	Container Rental Income
FYE 9-30-60	\$ 5,595.76	\$ 3,575.73
FYE 9-30-61	12,538.17	3,534.70
FYE 9-30-62	25,445.48	(607.91)
FYE 9-30-63	56,288.83	19,809.70
FYE 9-30-64	115,798.98	56,044.10
FYE 9-30-65	155,075.98	90,379.00

**(b) Regular and Consistent Movement in
Interstate Commerce:**

Sun Valley's containers were shipped from outside the State of Nevada [R. 4591]. Disposal Investment's containers were shipped from outside the State of Nevada [R. 4883]. Sun Valley's shipments were set forth in an affidavit of R. J. Collet [R. 842-843]. Disposal Investments obtained its shipments once a week for immediate delivery to customers [R. 4785-4786]. Disposal Investments delivered containers to its customers pursuant to specific orders and maintained an inventory in its yard [R. 5983-5985]. The containers were stock items, manufactured in quantity [R. 5345]. The containers had to be replaced about every six years [R. 843, 4784, 5355]. The annual purchases by Disposal Investments of containers have been as follows [R. 1121-2]:

<u>Year</u>	<u>Annual Purchases</u>
FYE 9-30-61	\$26,417.94
FYE 9-30-62	34,139.46
FYE 9-30-63	61,118.93
FYE 9-30-64	48,686.85
FYE 9-30-65	41,430.27

**(c) Depressive Influence of Independents
on Rental Rates:**

The goal of Disposal Investments was to maintain a uniform container rental rate structure throughout Clark County [R. 4901-4902]. Disposal Investments had certain large customers which managed apartment house properties in the City of Las Vegas, City of North Las Vegas and the unincorporated area of Clark County [R. 4893-4895, 4899-4900]. Disposal Investments admitted that any reduction of container rental rates in the unincorporated area of Clark County would influence its rate structure in the City of Las Vegas or City of North Las Vegas; for a customer in the City of Las Vegas would ask why he was paying \$5 on the Strip for example, which was in the unincorporated area of Clark County, and was paying \$7.50 in the City of Las Vegas [R. 4902]. Rate reduction in the unincorporated area of Clark County would inevitably lead to rate reduction in the cities [R. 4720].

Disposal Investments admitted that Sun Valley was exerting a competitive influence on the rate structure through its solicitation of apartment house accounts in the unincorporated area of Clark County [R. 4714-4715, 4720]. Disposal Investments considered apartment houses to be container rental accounts [R. 4904-4905].

Disposal Investments admitted that certain of its customers obtained containers on the open market directly from the manufacturers or outside suppliers [R. 4895-4897, 4900].

(d) Defendants' Attitude of Hostility Toward the Independants Due to Their Depressive Influence on a Uniform Rate Structure:

Upon entry into the business the defendants revealed hostility to the independents in Clark County, because a lower price structure in the garbage pick-up and disposal operation would adversely affect the ability of the defendants to hold the price line in the pick-up territories where they held franchises.

The record contains the following evidence by deponent Chason with regard to the defendants' attitude toward the independent that operated in the City of Henderson before the defendants bought him out [R. 1142]:

"A. I'm not positive who brought this up, whether Lester La Fortune brought it up or Al Isola when we returned back to the warehouse, stating that—I am trying to find a word to use for that—that a competitor who was small can hurt a larger competitor and by this man Wenchell holding the prices down can hurt our company in Las Vegas, so the best method would be either to buy him out or to try to get him to increase his rates. And I believe Lester La Fortune said it was cheaper to buy him out than to try to break him."

The record contains the following evidence by deponent Chason with regard to the defendants' attitude toward the independent that operated Clark Sanitation, Inc. in competition with the defendants in the unincorporated area of Clark County before the defendants bought Clark Sanitation, Inc. [R. 1134]:

"A. . . . Lester said that we ought to do the same thing that they are doing, if they are going

to cut our prices, we will go and undercut them, and he also said that he thinks he can get some of the accounts back by cutting prices that they have already taken away from us * * * (T)he suggestion was that if they don't take the business back they should buy him out. Lester thought he might be able to buy him out for a reasonable figure because they hadn't gotten anywhere yet with the— with the undercutting prices . . .”

These statements were followed in each case by acquisitions accompanied by covenants against competition. In a ten-month period, January to October 1958, the defendants removed every independent from each pick-up territory in Clark County and thus acquired what appeared to be at that time complete control of the garbage pick-up and disposal service and container rental activity in Clark County [R. 1446-1449, 1463-1464, 1577-1589, 1356-1360, 1370, 1378-1380, 398-404].

The option which LaFortune obtained from Chason to buy his controlling stock in Southern Nevada Disposal Service, Inc. contained no covenant or condition that Chason execute a covenant not to compete [R. 187-191]. On April 29, 1958, that option, though containing no requirement for a covenant against competition, was exercised [R. 1160]. Later, Chason did sign a five-year covenant against competition, after it was demanded by the buyer who had previously exercised the option [R. 398, 509, 512].

In June 1958, when the independent operator in the City of Boulder City was bought out, according to the deposition of the independent Peelen, the buyer de-

manded that Peelen agree not to re-enter the garbage business for five years and stated that the covenant should be broad because Peelen had roots in the entire area and LaFortune did not want Peelen to try to re-enter the garbage business in Clark County or any other place he had been except Kingman, Arizona. Peelen further testified that, although he expected to give a covenant against competition in the territory which was the subject of sale, that is, the City of Boulder City, the covenant not to compete which he signed was too broad, because it covered the entire Clark County [R. 1356-1360, 1370, 1378-1380].

In October 1958, when the independent competitor in the unincorporated area of Clark County, namely, Clark Sanitation, Inc. was integrated into the defendants' corporate combination, a seven-year covenant not to compete was obtained not only from the shareholders who sold their stock, but also from a key officer and broadly covered the entire Clark County as well as related activities [R. 4348-4353]. The deal was made after Clark Sanitation, Inc. threatened to engage in the profitable operation of collecting cardboard in the City of Las Vegas for resale in California in competition with Southern Nevada Disposal Service, Inc., a company at that time controlled by the defendants [R. 4238-4242].

(e) Anticompetitive Practices Directed Toward the Elimination of Sun Valley as an Independent:

In August 1960, Sun Valley was formed as a Nevada corporation and its equipment was purchased [R. 4502-4503]. On October 30, 1960 a Clark County business license was issued to Sun Valley [R. 1121-23 to 24]. LaFortune testified that he thought Sun

Valley was backed by the same people who backed Clark Sanitation, Inc., which the defendants had bought out two years before [R. 399-404, 4798-4799]. On November 15, 1960, Sun Valley wrote to the County Commissioners for clarification of its right to use the garbage dumpsite located in the unincorporated area of Clark County [R. 1121-33]. On November 17, 1960, Clark Sanitation wrote to the County Commissioners requesting an exclusive franchise for unincorporated Clark County [R. 1121-34].³

On about January 1, 1961, Sun Valley commenced its garbage pick-up and disposal service in unincorporated Clark County [R. 1121-24].

Subsequent commercial practices engaged in by the defendants as a combination were as follows: Use of the "deep pocket" financial power of Silver State Disposal through its Las Vegas franchise to make a loan to Clark Sanitation, thereby sustaining operations after about January 1961, at a loss in unincorporated Clark County [R. 1121-75, 76, 80, 154, 158, 149 to 165]; use of the "deep pocket" financial power of Silver State Disposal through its Las Vegas franchise, Disposal Transportation through its North Las Vegas franchise and Disposal Investment, between about September 1960 and September 1963, to make

³In Paragraphs D (4) and D (5), *infra*, of the Statement of Facts, there is recited the facts demonstrating the use of procedures which gave an unfair advantage to Clark Sanitation, Inc., handicapped Sun Valley, violated the statutory requirement of competitive bidding and thus led to action beyond the outer periphery of the authority of the County Commissioners, whereby Sun Valley was ultimately eliminated as an independent in the unincorporated area of Clark County on about April 4, 1965, and the facts demonstrating misrepresentations in Clark Sanitation's proposal for the exclusive franchise.

interest-free advances to Clark Sanitation, there by enabling Clark Sanitation to pass its operating costs on to said corporations [R. 1121-149 to 165]; deferral of collection of account receivables from certain customers of Clark Sanitation, who became customers of Sun Valley in about January 1961, until their return to Clark Sanitation [R. 1121-152]; adoption and maintenance by Clark Sanitation of a combination rate for providing garbage collection and disposal service and container leasing to a class of customers in unincorporated Clark County, which did not yield sufficient revenue to cover operating costs, thereby enabling Clark Sanitation to impose a prize squeeze [R. 4906, 708-714, 1121-26]; adoption in about September 1963, retro-active for one year, and maintenance thereafter by Disposal Investments of a discriminatory reduction of container rental charged to Clark Sanitation for containers which Clark Sanitation furnished at a combination rate with garbage collection and disposal service to a class of customers in unincorporated Clark County, thereby enabling Clark Sanitation to pass its operating costs on to Disposal Investments [R. 638, 694, 708-714]; use of an accounting method of allocating the expense of jointly used trucks between Silver State Disposal and Clark Sanitation after about June 1963, pursuant to which records of the facts on which said allocation was purportedly based were destroyed, thereby enabling Clark Sanitation to conceal a passing of its operating costs on to Silver State Disposal [R. 59, 60]; use of the borrowing capacity of Silver State Disposal, based on its Las Vegas franchise, and of Disposal Investments to obtain the use of trucks, equipment and containers by Clark Sanitation [R. 2504-2505, 2519-

2524, 2534-2537]; participation in an agreement, understanding, plan or program in about April 1963, with Arata Pontiac, a San Francisco equipment distributor, whereby Silver State Disposal received from Arata Pontiac terms and prices, in connection with the purchase of trucks and equipment, which Arata Pontiac would not make available to other garbage collection and disposal operators [R. 2523-2524, 2728, 6397-6400].

2. Advantages in Their Own Interstate Dealings Resulting from Defendants' Trade Practices.

(a) Interstate Business of Defendants:

The defendants have combined their corporate and individual bonding capacities to maintain in full force and effect, for the benefit of themselves or their licensees, franchises and exclusive contracts for supplying garbage pick-up and disposal service in selected territories in Nevada (Las Vegas, North Las Vegas, Henderson, Boulder City, unincorporated Clark County) and Arizona (Page) [R. 2964, 3018-3019, 3031, 3152-3155, 3370, 3373, 3378, 3380-3391]. Said franchises and exclusive contracts have been the subject of commercial barter, to-wit: A sale involving \$391,313.84 was conditioned on the Cities of Las Vegas and North Las Vegas consenting to the transfer of the franchises granted by said cities [R. 1154]. The Henderson franchise was sold as part of a \$25,000 transaction [R. 1577]. The Page, Arizona, contract was sold as part of a \$10,000 transaction [R. 1121-19]; and the Page, Arizona, contract encompassed an area in Arizona owned by private persons since about 1959 or 1960, so that the contract was not merely a contract to provide

service to the United States Government, but also involved the privilege to supply garbage pick-up and disposal service to private customers in Page, Arizona [R. 2096, 2113, 3660, 3669]. The Page, Arizona, operation involved periodic visits by Nevada management to supervise the Arizona operation [R. 703]. The revenue checks were mailed each month across state lines [R. 700]. The contracts were negotiated by the transmittal of documents through interstate mail [R. 701]. The trade name, Henderson Disposal Service, which was used in Nevada operations, was licensed for use in Arizona [R. 2371-2373, 3747-3750, 3752-3753, 3759-3762]. The equipment used for the Arizona operation was shipped from Nevada [R. 3735-3736].

**(b) Existing and Potential Competition to Defendants'
Interstate Business:**

Interstate competition during this period included Parks and Sons, which held contracts and franchises in Idaho, Oregon and Arizona [R. 4372-4381]. Its trucks and personnel were available for multistate operations [R. 4391-4395]. Its management for the operations in three states was integrated [R. 4396-4398]. It could have fitted the Page, Arizona, operation into its system [R. 4401-4406]. It received no notice of an opportunity to bid the Page, Arizona, contract or it would have submitted a bid [R. 4406-4407]. It was also interested in buying into the Las Vegas area at one time and had serious discussions to purchase the Las Vegas operation in about 1956 to 1957 [R. 4407-4408]. It was under the impression that bidding in the Las Vegas area was foreclosed by a franchise [R. 4431].

3. Customer Relationship of Defendants With Arata Pontiac as Out-of-State Supplier of Elgin-Leach Equipment.

Substantially all of the trucks and equipment used by the garbage pick-up and disposal service defendants were purchased under contracts with Arata Pontiac as seller, Silver State Disposal as buyer and Bank of America financing the transactions through an Arata Pontiac dealership relationship [R. 173-174, 2519-2524, 2534-2537]. The credit rating of Silver State Disposal, supported by the City of Las Vegas franchise, was the basis of the purchases [R. 2503-2504, 2728]. Arata Pontiac was a San Francisco business which held a Pontiac automobile and International truck dealership [R. 2661]. Arata Pontiac also sold garbage pick-up and disposal equipment for use by the defendant companies in Clark County [R. 2789-2820]. David Arata, who was a stockholder, officer and director of Arata Pontiac, was also a director of the defendant companies and participated in frequent discussions as to their business policies [R. 4673-4676].

Through its Pontiac automobile-International truck dealership, Arata Pontiac had established an excellent credit rating with the Bank of America, which enabled it to arrange financing for garbage trucks and Leach bodies [R. 2459-2463, 2511]. In 1955 Arata Pontiac, through Arata Equipment Co., became distributor in Northern California for the Elgin-Leach equipment line [R. 2842, 2874]. In 1959, the distributorship was expanded to include Southern Nevada [R. 2903].

The basis for the expansion of the distributorship to Nevada was stated by Alvin Arata: "They had to have —these people, Isolas and LaFortune. And they had to have somebody representing them in that area." [R. 2845]. The Aratas in 1958 had invested money toward financing the LaFortune acquisition of the controlling stock of Chason in the Southern Nevada operations for garbage pick-up and disposal service [R. 2694]. Therefore, the Aratas had the contact with the defendants as equipment customers [R. 2845].

Arata Pontiac knew that the trucks, though purchased on the basis of the borrowing capacity of Silver State Disposal, would be used on routes in unincorporated Clark County operated by Clark Sanitation, Inc. [R. 2749-4751]. Alvin Arata, a stockholder, officer and director of Arata Pontiac, advised Silver State Disposal as to the maximum number of front-end loaders to purchase for large-volume commercial pick-ups, since Leach did not at the time manufacture front-end loaders and Arata Pontiac wanted to maximize the Leach sales under its franchise and minimize Silver State Disposal's purchase of competitive equipment [R. 2827-2830].

In April 1963, Arata Pontiac allowed Silver State Disposal to purchase a \$169,000 fleet of equipment without a down-payment and at factory cost: "Our dealer Arata Pontiac is selling trucks to Silver State Disposal Co. at his cost" [R. 2523]. Alvin Arata admitted that such a sale was a departure from Arata Pontiac's long established policy [R. 6397-6400].

4. Adoption by County Commissioners of Procedures That Evaded Competitive Bidding by Giving an Advantage to Clark Sanitation and Placing Other Bidders at a Disadvantage.

(a) First Award of a Franchise:

From November 17, 1960 to June 20, 1961, Clark Sanitation solicited and instigated the County Commissioners to give a franchise to Clark Sanitation for the exclusive garbage pick-up and disposal service in unincorporated Clark County and for the exclusive use of the County disposal site [R. 1121-268 to 270, 337, 339]. The franchise was awarded August 7, 1961 [R. 1121-306].

(b) Court Action Invalidating Franchise:

On August 16, 1961, Sun Valley filed suit to invalidate the franchise [R. 1121-203 to 216]. On January 17, 1963, the state court rendered a court decision invalidating the franchise that had been awarded on August 7, 1961 to Clark Sanitation [R. 1121-244 to 254]. That decision held as follows: That the procedures adopted by the County Commissioners must comply with NRS 244.187, that the statute requires competitive bidding and that specifications are required which assure competitive bidding [R. 1121-246, 250 to 251]. On April 4, 1963, the state court rendered Findings of Fact, Conclusions of Law and Judgment [R. 1121-255 to 263]. Among its Conclusions of Law, the state court included: "10. An enforceable contract was not entered into between the Board of County Commissioners and Defendant, Clark Sanitation, Inc., because Defendant Clark Sanitation, Inc.'s bid could not be lawfully accepted by the Board, since there was no equal opportunity to bid on a competitive basis." [R.

1121-262]. The judgment was not appealed from; and the conclusions of law were brought to the special attention of the County Commissioners [R. 1121-361].

(c) Second Evasion of Competitive Bidding:

The defendants' agent admitted on March 5, 1965, as follows [R. 1121-391]:

"... (W)e took the city contract with the city ordinance and in it in the proposed ordinance that we furnished this Commission a year ago we took the same rates that were then in existence in the city and in it we suggested about the same I think in that particular matter identical language that we would have the right as well as the county has the right at any period—I think it was every 6 months where the county could review it and reduce or increase the rate and in the event of matters of war, tremendous increase of labor costs, or inflation, and that sort of thing that we would come before the Board upon a written application for a review of the ... it worked both ways. Increase and decrease as I recall."

LaFortune testified that the defendants transmitted a copy of the City of Las Vegas ordinance to the County Commissioners before the county ordinance was proposed and that he discussed the proposed county ordinance informally with individual County Commissioners [R. 6026-6027]. On April 20, 1964 Ordinance No. 214 was proposed to the County Commissioners, and on June 5, 1964, it was enacted [R. 1121-353 to 359]. The ordinance authorized the County Commissioners to contract for garbage collection and disposal and set out the rates for collection,

hauling and disposal of garbage [R. 1121-354, 356, 357]. LaFortune assumed from the fact that the ordinance established the rates to be charged in the county that the ordinance was preparatory to an invitation to bid for a franchise [R. 6081].

LaFortune admitted that, if the rates to be charged the public had not been predetermined by ordinance and thus removed as a bid variable, Clark Sanitation, Inc. would still have been able to submit a bid, because an experienced operator knows exactly what it costs to pick up an item in any district per person [R. 6197-6198]. However, Ordinance No. 214 in effect told the bidders what the rates would be, so the bid variables would be directed to other factors [R. 6195, 6197].

Subsequently, LaFortune conferred with county representatives on the terms of the proposed franchise [R. 6227, 6229-6230]. On January 25, 1965, the County Commissioners issued the Invitation to Bid, Instructions and Proposed Contracts, which contained blank spaces to be filled in by the bidders [R. 1121-367 to 381]. The County Commissioners invited separate bids for an exclusive franchise with respect to collection and disposal of garbage and for a use permit for the operation and maintenance of a garbage dump, but added that any person or firm may submit bids for both garbage collection and maintenance and operation of the garbage dump and further added that the County Commissioners reserved the right to consider the bids for the franchise and the use permit separately or together, when making its determination as to the granting of the franchise and the use permit [R. 1121-369 to 370].

The proposed contract for the collection and disposal of garbage stated in its pertinent portion [R. 1121-371]:

"1. * * * CONTRACTOR agrees to purchase, contract for the purchase of, or lease, new equipment costing not less than \$..... as the necessity therefor presently exists or may hereafter arise, and/or to make available in connection with the performance and rendition of services herein provided presently owned or leased equipment (more particularly described in the inventory attached hereto) in the estimated value of not less than \$.....

"2. * * *

"3. CONTRACTOR shall provide for the payment on a quarterly basis, of a license fee to County based on percent (....) of the gross monthly collections of all the rates, fees, and charges derived from the exercise of the privilege of this franchise. * * *"

The proposed contract for the maintenance and operation of the dumpsite stated in its pertinent portion [R. 1121-37 to 379]:

"1. * * * CONTRACTOR agrees to purchase, contract for the purchase of, or lease, new equipment costing not less than \$..... as the necessity therefor presently exists, or may hereafter arise, and or to make available in connection with the maintenance and operation of said 'dump' or 'dumps' presently owned or leased equipment (more particularly described in the inventory attached hereto) in the estimated value of not less than \$.....

“2. * * *

“3. CONTRACTOR shall provide for payment on a quarterly basis of a license fee to County based on percent (....) of the gross monthly revenue derived from whatsoever source and/or connected with the maintenance and operation of said ‘dump’ or ‘dumps’; * * *

* * *

“6. * * * The use of the facility or facilities free of all charges or exaction of payments, shall at all times be made available to any holder of a franchise from the County or any municipality within Clark County for the collection and disposal of garbage or refuse. * * *

These provisions in the proposed contract bestowed an unfair advantage on Clark Sanitation, Inc. and fettered competition for the following reasons:

75% to 85% of the business of the dumpsite came from the City of Los Vegas franchise holder, dump charges could not be imposed upon the City of Las Vegas franchise holder and the City of Las Vegas franchise holder was a corporate affiliate of Clerk Sanitation, Inc. [R. 1121-385].

The defendants’ agent admitted on March 5, 1965, as follows [R. 1121-388]: “. . . (W)e have operated this dumpsite over a period of some 13 years—14 years now, since 1952.” As a result, in their bids the defendants represented that they would make available \$81,200 worth of presently owned or leased equipment in connection with the operation and maintenance of the dumpsite [R. 1121-378, 383]. By contrast, the plaintiff had no equipment for the operation and maintenance of a

dumpsite for the obvious reason that the only dumpsite in Clark County was operated and maintained by defendants' affiliate [R. 1121-399]. Actually, the bidder, Clark Sanitation, Inc., did not operate or maintain the dumpsite. It was Silver State Disposal, Inc., the corporate affiliate of Clark Sanitation, Inc., which did so; and this operation arose out of an informal agreement with the Board of County Commissioners, because the dumpsite was federal land held by Clark County for use as a public garbage disposal site under a special land-use permit until 1962 and thereafter under a 20-year lease [R. 1121-200 to 207, 297 to 300].

The Board of County Commissioners reserved the right to consider the bids for the franchise and the use permit either separately or together, when making its determination as to the granting of the franchise and the use permit [R. 1121-413 to 424]. The award voted by the Board of County Commissioners at the March 5, 1965 meeting was as follows: "... (P)ackage deal. Dumpsite and pickup." [R. 1121-392].

(d) Relationship of One or More County Commissioners to Clark Sanitation:

Louis F. La Porta was an insurance agent who was engaged in writing bonds and insurance for the garbage collection and disposal operations conducted by corporations affiliated with the Clark Sanitation during the years 1965 to 1966, inclusive [R. 6170].

William H. Briare, in the course of his private insurance agency business, began writing insurance for corporations affiliated with Clark Sanitation in late 1964 or early 1965 [R. 6028, 6050]. Since he was a County Commissioner elected from the area within the

City of Las Vegas, he claimed in his deposition that he felt that the company which operated the disposal site should have the county business added to its Las Vegas business so that it would not be necessary for that company to seek a city rate increase from the City of Las Vegas in order to finance future operations at the dumpsite cut and fill operation, and he knew that the dumpsite could not charge a company that had a franchise with another municipality, so that he felt the dumpsite and the collection of garbage in Clark County were tied together [R. 1533, 1541-1542, 1545, 1547].

Darwin W. Lamb was engaged in the street sweeping business and in the course of that private business he used equipment of the Clark Sanitation and its affiliated corporations, that is, storage containers for the deposit of trash at the premises swept; and the fact that Clark Sanitation and its affiliated corporations had containers at the hotels and shopping centers was a substantial factor in his vote [R. 1596, 1605-1606, 1609, 1611].

Robert T. Baskin, in the course of his private restaurant business in Las Vegas, used the garbage disposal services of Silver State Disposal and felt that there should only be one garbage collection operator, and Silver State Disposal was an affiliate of Clark Sanitation, and that therefore the franchise should be given to the company whose affiliate had a garbage collection franchise with the City of Las Vegas and whose affiliate operated the disposal site, so that the same company that had the equipment to operate the disposal site also obtained the award of the collection franchise [R. 1496-1501, 1508-1511, 1522-1523].

At the meeting of the County Commissioners at which the franchise was voted, Briare, Lamb and Baskin voted in favor of the award of the franchise to Clark Sanitation, and after the majority vote was cast, La Porta answered: "I would like the record to show that my vote is passed, the purpose being that my agency has represented the client as a broker in a neighboring municipality." [R. 1121-392]. La Porta did not disqualify himself when he voted to adopt Ordinance No. 214, which fixed the rates in advance of the invitation to bid and thus removed rates to the public as a bid variable [R. 848-849].

5. Misrepresentations Made in Clark Sanitation's Proposal for the Exclusive Franchise.

In the Invitation to Bid for the garbage pick-up franchise, the applicant was asked to state what he agreed "to make available in connection with the performance and rendition of services herein provided presently owned or leased equipment (more particularly described in the inventory attached hereto) in the estimated value of not less than \$....." [R. 1121-371]. Clark Sanitation listed what purportedly represented "Inventory of Rolling Stock Owned, Operated and or Leased by Clark Sanitation, Inc., February, 1965" [R. 1121-376]. However, the way Clark Sanitation and its related companies conducted their operations, from time to time a piece of equipment owned by one company would be used for a portion of time in an area of a different company, such as Clark Sanitation, which did not own the equipment [R. 5927-5928]. Thus, inter-company pooling might result in Clark Sanitation using Silver State Disposal equipment as little as 8½% of the

time and yet all of that equipment was listed in the inventory [R. 5928-5930]. Only particular trucks were regularly assigned to a single company's routes [R. 5928-5929]. As a result, it appeared as if Clark Sanitation was operating \$327,010.96 of rolling stock in unincorporated Clark County [R. 1121-376]. By contrast, only 25% of the capacity of the defendants' trucks were used in unincorporated Clark County [R. 4727-4728].

In the Invitation to Bid for the dumpsite use permit, the applicant was asked to state what he agreed "to make available in connection with the maintenance and operation of said 'dump' or 'dumps' presently owned or leased equipment (more particularly described in the inventory attached hereto) in the estimated value of not less than \$....." [R. 1121-378]. Clark Sanitation represented its presently owned or leased equipment to be valued at \$81,200 and furnished an inventory of dumpsite equipment [R. 1121-383]. In truth, Clark Sanitation never operated and never had an item of dumpsite equipment, for it was Silver State Disposal that operated the dumpsite [R. 1121-70, 71, 84]. Indeed, in their financial statements for the year ending September 30, 1965, the defendants admitted: "On April 1, 1965, a franchise to operate the dump was issued by the Clark County Commission to Clark Sanitation, Inc. The dump equipment was purchased from Silver State Disposal Service, Inc. which had operated the dump prior to April 1, 1965." [R. 1121-169].

On March 11, 1965, six days after the award of the franchise, Clark Sanitation sent to Sun Valley's customers a printed form letter, stating that on March 5,

1965, the Board of County Commissioners did award the exclusive contract to Clark Sanitation and soliciting not only the pick-up account, but also a container rental account [R. 1121-35].

SPECIFICATION OF ERRORS.

The District Court committed prejudicial error in granting the defendants' motion for summary judgment for the following reasons:

1. There was a genuine factual issue whether container leasing was a line of interstate commerce on which the trade practices complained of had an effect.

2. There was a genuine factual issue whether the defendants conducted an interstate business which was benefited by the trade practices complained of, and the accrual of an advantage by an interstate business conducted by the defendants meets the test of "affecting interstate commerce" even if the plaintiff does not directly engage in trade across state lines.

3. There was a genuine factual issue whether the defendants had established a customer relationship with the distributor of a particular garbage pick-up equipment manufacturer of such a nature that interstate commerce in equipment distribution was affected by the trade practices complained of.

4. There was a genuine factual issue whether defendants carried out an anticompetitive scheme through trade practices a part of which grew out of proceedings before the County Commissioners on the subject of an exclusive franchise for garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada.

5. Misrepresentations in a bid for an exclusive franchise resulting in the rejection of competing bids and the issuance of the franchise and the subsequent use of the fruits of such conduct for the purpose of excluding competition may, in total, be found to constitute part of a broader scheme violative of the antitrust laws without an attack on the franchise.

6. There was a genuine factual issue whether the procedures adopted by the county commissioners destroyed the free competition on a common basis the state statute demanded, and a franchise granted in violation of the statutory requirement would be action beyond the outer perimeter of statutory authority and therefore without immunity from the antitrust laws.

7. There was a genuine factual issue whether the invitation for bids was a sham that evaded the free competition on a common basis state statute demanded, and a franchise granted in violation of the statutory requirements would be action beyond the outer perimeter of statutory authority and therefore without immunity from the antitrust laws.

8. There was a genuine factual issue whether the grant of a franchise was influenced in furtherance of an anticompetitive conspiracy participated in by one or more County Commissioners, and such conspiratorial conduct would be subject to the antitrust laws.

SUMMARY OF THE ARGUMENT.

The evidence before the court below presented a triable issue of fact whether the defendants engaged in practices amounting to the removal of independents so as to keep them from having a depressive influence on county-wide container rental rates and to enable the defendants to gain control of the container rental rate structure in Clark County, Nevada. An inference could be reasonably drawn from the evidence that the container rental activity was a separate sub-market in a line of interstate commerce in which the litigants participated and that the flow of interstate commerce continued until the containers reached the customers of the garbage pick-up and disposal service. There was a genuine triable issue whether the trade practices complained of were in restraint of interstate commerce.

The evidence before the court below presented a triable issue whether the defendants conducted an interstate business that inevitably had to be strengthened by the removal of the independents in Clark County, Nevada. The broad test of "affecting interstate commerce" within the meaning of the Sherman Act is met if a defendant's anticompetitive trade practices gave it a definite advantage in its own interstate dealings. It is not essential to satisfy the jurisdictional scope of the antitrust laws that the plaintiff directly engage in trade across state lines.

The evidence before the court below showed that the fact-finder could infer the existence of a favored reciprocal relationship between the defendants and an interstate distributor of garbage pick-up equipment which competed with other products in interstate commerce.

Inevitably the removal of independents from Clark County, Nevada, would leave the defendants as the sole outlet for hundreds of thousands of dollars worth of equipment and would thus make it more difficult for competing brands of equipment not distributed or favored by the said distributor to find outlets in Clark County, Nevada.

The fact-finder must look at the whole picture, not merely each of the specific trade practices. Collective consideration of the defendants' trade practices shows that there was a genuine factual issue whether the defendants carried out an anticompetitive scheme through their trade practices, a part of which grew out of the proceedings before the County Commissioners on the subject of an exclusive franchise for garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada.

The evidence before the court below showed that deliberate overstatements amounting to fraud were made in Clark Sanitation's proposal for the exclusive franchise for the garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada. The court below recognized that there was inferential support in the evidence for a finding of misrepresentation. It erroneously concluded that the franchise must be attacked. However, the right to conduct the garbage disposal business in the unincorporated area of Clark County, Nevada, and the right to competitively bid for the franchise was a common right. It was in an economic framework that the bids were to be submitted and considered. The restriction of that right in the case at bar was effectuated by fraud. The public has a paramount interest in seeing that a restriction

of a common right springs from a background free from fraud. An attack on the franchise is unnecessary. The County Commissioners did not pass on the true situation, because the facts had been withheld pursuant to an anticompetitive scheme. The misrepresentations and the subsequent use of the fruits of such conduct for the purpose of excluding competition may, in total, be found to constitute part of a broader scheme violative of the antitrust laws without an attack on the franchise.

There was evidence before the court below that the procedures adopted for the award of the franchise were illegal. The plaintiff has a primary right not to have its business injured by a pattern of conduct violative of the Sherman Act. Where the plaintiff's damages result from a pattern of conduct unlawful but for a defendant's contention that its conduct was state-directed, the plaintiff has a right to show that the injurious conduct was carried out in excess of statutory authority. A federal court whose jurisdiction has been invoked under the antitrust laws has a duty to decide questions of state law when necessary to the rendition of a judgment. In the case at bar, there was a genuine factual issue remaining for trial whether the procedures referred to by the court below as illegal in practical effect destroyed the free competition on a common basis which the statute demanded. The bid documents and the variables and conditions of bidding were tailored to handicap bidders other than Clark Sanitation. In Nevada, violation of a statutory requirement of competitive bidding is action beyond the outer perimeter of authority. The state court of Nevada has held that the governing state statute requires competitive bidding as

the method by which the County Commissioners must proceed to grant a franchise.

There was evidence that, not only was the competitive bidding required by the state statute destroyed, but that one or more of the County Commissioners favored Clark Sanitation for personal selfish reasons unrelated to the public interest. There was a trial question whether the invitation for bids was a sham, done only to appear to comply with the law and to clothe the proceedings with the habiliments of legality. A conclusion that the proceeding before the County Commissioners was a subterfuge to evade competitive bidding would subject the franchise to attack in a private antitrust action. The County Commissioners would not have the power to decide whether their invitation for bids was a sham.

The same inferential proof that supports a genuine triable issue whether the invitation for bids was a sham and whether one or more County Commissioners favored Clark Sanitation for personal selfish reasons unrelated to the public interest permits the fact-finder to conclude that one or more County Commissioners joined an anticompetitive scheme and in furtherance thereof influenced the grant of the franchise. Such conspiratorial conduct would be subject to the antitrust laws.

ARGUMENT.

I.

THERE WAS A GENUINE FACTUAL ISSUE WHETHER CONTAINER LEASING WAS A LINE OF INTERSTATE COMMERCE ON WHICH THE TRADE PRACTICES COMPLAINED OF HAD AN EFFECT.

"(T)he question whether summary judgment is appropriate in any case is one to be decided upon the particular facts of that case." *First National Bank of Arizona v. Cities Service Co.*, 88 S. Ct. 1575, 1577 (1968).

In *American Mfrs. M. I. Co. v. American Broadcasting-Para. Th.*, (2 Cir. 1967) 388 F. 2d 272, 280-282, the issue was whether a group of television stations was a single "product" or different "products" for the purpose of determining whether a network made a tie-in sale, which requires separate tying and tied products. It was held that the evidentiary facts permitted different inferences to be drawn on the question of separability and that a summary judgment must therefore be reversed, since *United States v. Diebold*, 269 U.S. 654, 655, 82 S. Ct. 993, 994, 8 L. Ed. 2d 176 (1962), dictates conformity to the principle that, "(o)n summary judgment the inferences to be drawn from the underlying facts contained in such materials (affidavits, exhibits and depositions) must be viewed in the light most favorable to the party opposing the motion."

The court added, 388 F. 2d at 279-280:

"Moreover, we have been forewarned that the use of summary judgment in complex antitrust litigation must be closely scrutinized. *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 473, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962). And,

this admonition is apt where too little is known of the practical impact of the challenged transactions. *White Motor Co. v. United States*, 372 U.S. 253, 263-264, 83 S. Ct. 696, 9 L. Ed. 2d 738 (1963). But, this is not to say that summary judgment never has a place in the antitrust field. (citations)

"The question before us is not the availability of the rule in any specific category of cases, but whether the record in this particular case adequately clarifies the complex and convoluted issues that are so common in antitrust litigation.

Thus, our holding here does not weaken the force of Rule 56, but 'simply recognize(s) that there are instances where summary judgment is too blunt a weapon with which to win the day, particularly where so many complicated issues of fact must be resolved in order to deal adequately with difficult questions of law which remain in the case.' *Miller v. General Outdoor Advertising Co.*, 337 F.2d 944 (2d Cir.1964)."

In *Southern Blowpipe & Roofing Co. v. Chattonooga Gas Co.*, (6 Cir. 1966) 360 F. 2d 79, a summary judgment was reversed in an antitrust case involving the question whether a utility already possessed of a legal monopoly which, in the service of that monopoly, avails itself of the peculiarities of utility rate-making to sell below cost in the competitive field of selling appliances may be found to have violated the antitrust laws. The court stated, 360 F. 2d at 81 :

"Notwithstanding the salutary and timesaving uses of summary judgment, Judge Miller of this Court took occasion to speak at some length of

the restraints that should be observed in its use. *S. J. Groves & Sons Co. v. Ohio Turnpike Commission*, 315 F.2d 235, 237 (CA 6, 1963). Spar-
ing employment of it in the complex field of the
antitrust statutes was admonished by the Supreme
Court in *Poller v. Columbia Broadcasting Co.*,
368 U.S. 464, 467, 473, 82 S.Ct. 486, 7 L.Ed.2d
458 (1962) and *White Motor Co. v. United States*,
372 U.S. 253, 259-264, 83 S.Ct. 696 (1963)."

See *Tillamook Cheese & Dairy Association v. Tilla-
mook County Creamery Association*, (9 Cir. 1966) 358
F. 2d 115, 117.

The plaintiff's evidence was sufficient to justify a
finding by the jury that the defendants engaged in
practices amounting to the removal of independents so
as to keep them from having a depressive influence on
county-wide container rental rates and to enable the de-
fendants to gain control of the container rental rate
structure in Clark County, Nevada. Such a finding may
be inferred from the evidence set out in Paragraph
D(1) of the Statement of Facts, *supra*. Thus we are
left with the question whether such activities by defend-
ants were in restraint of interstate commerce and
whether the court below erroneously withdrew that ques-
tion from the jury by granting a summary judgment.

**A. An Inference May Be Drawn That the Con-
tainer Rental Activity Was a Separate Sub-
Market.**

Utilities engage in merchandising activity. *Re Pro-
motional Activities by Gas & Elec. Corporations*, (N.Y.
P.S.C. 1967) 68 PUR 3d 162. A utility may conduct
an appliance rental program that is a separate and dis-

tinct operation. *Re Intermountain Gas Co.*, (Idaho P.S.C. 1967) 67 PUR 3d 511. A utility may engage in trade practices affecting an appliance market in a line of interstate commerce that conflict with the Sherman antitrust laws. *Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co.*, *supra*, 360 F. 2d at 81. A pragmatic approach to the merchandising activities of companies which perform a local garbage pick-up and disposal service leads to the inevitable conclusion that the court below failed to pierce economic realities, when it stated that interstate commerce, in the acquisition of equipment and supplies for the garbage collector, was incidentally involved [R. 1098]. The court below has misplaced its reliance on *Page v. Works*, (9 Cir. 1961) 290 F. 2d 323, cert. denied, 368 U.S. 875, 82 S. Ct. 121, 7 L. Ed. 2d 76 (1961), because an evaluation of business facts shows that this decision is not controlling. A motion for summary judgment cannot be determined by showing what another court did or did not decide on a different set of facts and on a different evidentiary showing.

The evidentiary facts recited in Paragraph D(1)(a) of the Statement of Facts, *supra*, are incorporated herein by reference. A fact-finder may readily infer that the container rental activity was a separate and distinct operation; it was conducted on a mass scale by Disposal Investments, Inc., whose investment, revenue and expenses were separately accounted for; its rental rates were not regulated by any governmental body; its profitability was stated by the defendants in their financial reports to be enormous; its rate structure was subject to the depressive influence of the rates charged by independents. Clearly, it is unrealistic to say as a

matter of law that the container rental activity was not viewed as a merchandising activity. The costs of operation of container leasing was not treated as an item of expense for supplies of the garbage pick-up operation. Rental income was not merged with pick-up revenue for rate-making purposes in territories where an affiliate of the defendant had a franchise. The very fact that defendant Disposal Investments, Inc. sought a separate container franchise from the City of Las Vegas reveals that it was a distinct merchandising activity [R. 830, 822-827]. If it merely involved supplies to a garbage collection service and Silver State Disposal had an exclusive contract in the City of Las Vegas for garbage pick-up and disposal service, why would Disposal Investments, Inc. have applied to the City of Las Vegas for a container franchise? Surely, the court below erred in depriving the fact-finder of the opportunity to consider container rental activity, not as the mere incidental furnishing of supplies for garbage collection, but as a separate form of merchandising. Both plaintiff and defendants engaged in container rental activity. "(T)here may be submarkets that are separate economic entities." *United States v. Grinnell Corp.*, 384 U.S. 563, 572, 86 S. Ct. 1698, 16 L. Ed. 2d 778, 787 (1966); *Bailey's Bakery, Ltd. v. Continental Baking Company*, (D. Hawaii 1964) 235 F Supp. 705, 715.

The defendants herein conducted their container rental activity as a separate and distinct operation. They used Disposal Investments, Inc., a separate corporation, for that purpose. They maintained separate books of account and engaged in the container leasing business throughout Clark County, Nevada [R. 176, 181, 4842]. Disposal Investments had the advantage of available

customers in the cities of Las Vegas and North Las Vegas, where it had exclusive contracts for garbage pick-up and disposal service [R. 4882]. However, Disposal Investments' rental rates in the City of Las Vegas, City of North Las Vegas and unincorporated Clark County were not regulated by any government body [R. 4838]. In unincorporated Clark County, Sun Valley was a competitor not only in garbage pick-up and disposal service, but also container rentals [R. 842-843, 4720]. The rates charged in unincorporated Clark County influenced the rates charged in the City of Las Vegas [R. 4719, 4720].

Disposal Investments had a number of large customers who owned and managed apartment house properties in both the City of Las Vegas and unincorporated Clark County [R. 4893-4894, 4899-4900]. The apartment house customers were billed separately for container rentals [R. 4905-4906]. Disposal Investments could not charge a lower container rental in unincorporated Clark County than in the City of Las Vegas and so its policy was to maintain a uniform container rental rate in both territories [R. 4901-4902]. Rates charged to customers in the City of Las Vegas were influenced by the rates charged to customers in unincorporated Clark County [R. 4720]. Sun Valley Disposal Co. was viewed by the defendants a potential price-cutter [R. 4714-4715]. Sun Valley took about 1,000 apartment house accounts from the defendants [R. 4720]. The defendants claim that they could not reduce prices in the unincorporated Clark County because that might result in customers demanding a reduction in the City of Las Vegas [R. 4719]. See *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 219-220, 60 S. Ct. 811, 842, 84 L. Ed. 1129 (1940).

B. An Inference May Be Drawn That the Flow of Interstate Commerce Continued Until the Containers Reached the Customers of the Garbage Pick-up and Disposal Service.

The plaintiff contends that the course of conduct complained of herein operated upon the containers while they were still in the flow of interstate commerce, which did not terminate until the containers reached the customers down the distribution line.

In *Las Vegas Merchant Plumbers Ass'n. v. United States*, (9 Cir. 1954) 210 F. 2d 732, 743, cert. denied, 348 U.S. 817, 75 S. Ct. 29, 99 L. Ed. 645 (1954), it was held that a case under the antitrust laws, so far as the interstate commerce element is concerned, may rest on the theory that the acts complained of occurred within the flow of interstate commerce. This is generally referred to as the "in commerce" theory. In that case there was evidence that goods were shipped to the wholesaler to fill special orders placed with him by the conspiring plumbers. Goods were also shipped by the manufacturers to the conspiring plumbers on direct order. Still other goods were shipped to the wholesaler for general resale. The court found the evidence sufficient to support the "in commerce" theory.

See *Independent Taxicab Operator's Ass'n v. Yellow Cab Co.*, (N.D. Cal. 1968) 278 F. Supp. 979, 984; *United States v. Pennsylvania Refuse Removal Association*, (3 Cir. 1966) 357 F. 2d 806, 808, cert. denied, 384 U.S. 961, 86 S. Ct. 1588, 16 L. Ed. 2d 674 (1966).

In *Standard Oil Co. v. F.T.C.*, 340 U.S. 231, 71 S. Ct. 240, 95 L. Ed. 239 (1951), it was held that gasoline retained its "in commerce" character after it was shipped from Indiana to Detroit and was stored to

await wintertime sale, where Standard could accurately estimate the demands of its customers.

See *City of Fort Lauderdale v. East Coast Asphalt Corp.*, (5 Cir. 1964) 329 F. 2d 868, 870-871; *Foremost Dairies, Inc. v. F.T.C.*, (5 Cir. 1965) 348 F. 2d 674, 677-678.

Walling v. Jacksonville Paper Company, 317 U.S. 564, 63 S. Ct. 332, 87 L. Ed. 460 (1943), was a Fair Labor Standards Act case which held that in three categories the special circumstances under which goods moving from out of state to an instate wholesaler for redistribution in the state may be said to have the requisite practical continuity of an interstate movement. Included are goods purchased by wholesalers (1) to fill a special order, (2) under a contract or understanding by which the wholesaler has agreed to fill the needs of a particular customer, or (3) to fill the anticipated needs of a particular customer although no contract or understanding to do so exists. For a discussion of the application of the *Walling* case to cases arising under the Sherman Act, see *Burke v. Ford*, (10 Cir. 1967) 377 F. 2d 901, 904, reversed on other grounds, 389 U.S. 320, 88 S. Ct. 443, 19 L. Ed. 2d 554 (1967).

A combination creating a monopoly or removing independents from the market so as to indirectly fix prices is "illegal per se". *United States v. General Motors Corporation*, 384 U.S. 127, 148, 86 S. Ct. 1321, 1332, 16 L. Ed. 2d 415, 428 (1966); *United States v. Aluminum Co. of America*, (2 Cir. 1945) 148 F. 2d 416, 427-428.

The amount of commerce involved is not material, especially where it clearly exceeds *de minimis*. *Safeway Stores, Incorporated v. F.T.C.*, (9 Cir. 1966) 366 F.

2d 795, 798; *Perryton Wholesale, Inc. v. Pioneer Distributing Co. of Kansas*, (10 Cir. 1965) 353 F. 2d 618, 622; *Apex Hosiery v. Leader*, 310 U.S. 469, 485, 60 S. Ct. 982, 987, 84 L. Ed. 1311 (1940); *United States v. Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at note 59, page 224, 60 S. Ct. at note 59, page 846, 84 L. Ed. at note 59, page 1168; *United States v. Yellow Cab Co.*, 332 U.S. 218, 225, 67 S. Ct. 1560, 1564, 91 L. Ed. 2010 (1947).

The periodic replacement of equipment has been held to be the subject of recurrent interstate commerce. *United States v. Yellow Cab Co.*, *supra*, 332 U.S. at 225, 67 S. Ct. at 1564, 91 L. Ed. at 2017.

II.

THERE WAS A GENUINE FACTUAL ISSUE WHETHER THE DEFENDANTS CONDUCTED AN INTERSTATE BUSINESS WHICH WAS BENEFITED BY THE TRADE PRACTICES COMPLAINED OF, AND THE ACCRUAL OF AN ADVANTAGE BY AN INTERSTATE BUSINESS CONDUCTED BY THE DEFENDANTS MEETS THE TEST OF "AFFECTING INTERSTATE COMMERCE" EVEN IF THE PLAINTIFF DOES NOT DIRECTLY ENGAGE IN TRADE ACROSS STATE LINES.

A. An Inference May Be Drawn That the Defendants Conducted an Interstate Business.

In *Stauffer v. Exley*, (9 Cir. 1950) 184 F. 2d 962, 966-967, it is stated:

"The trial court found that appellants 'are engaged in interstate commerce'. The complaint alleges that appellants have developed a special apparatus and method for giving therapeutic treat-

ments of passive exercise which they advertise in California and other states as 'Stauffer' treatments and 'Stauffer System' treatments. Appellants operate a place of business in Los Angeles where such treatments are rendered to the public and have licensed other places of business, both in California and other states, where such treatments are rendered under appellants' supervision and control as to nature and quality. Appellants train the operators of the licensed places of business in the method of rendering the treatments and provide the necessary special apparatus. All the licensed businesses use the trade name, 'Stauffer', with the express consent of appellants. *U. S. v. South-Eastern Underwriters Ass'n.*, 1944, 322 U.S. 533, 550, 64 S.Ct. 1162, 88 L.Ed. 1140."

Appellant incorporates herein by reference Paragraph D(2) of the Statement of Facts, *supra*, to show that defendants conducted an interstate business that inevitably had to be strengthened by the removal of the independents in Clark County, Nevada.

B. The Broad Test of "Affecting Interstate Commerce" Is Met if a Defendant's Anticompetitive Trade Practices Give It a Definite Advantage in Its Own Interstate Dealings.

In *Rangen, Inc. v. Sterling Nelson & Sons, Inc.*, (9 Cir. 1965) 351 F. 2d 851, the question was whether commercial bribery by a defendant occurred "in the course of (its own) interstate commerce" within the meaning of Section 2(c) of the Clayton Act, 15 U.S.C.A. § 13(c). It was shown that the commercial bribery, though local in character, enabled the defendant

to have stronger competitive capacity in its interstate business; and the Court stated, 351 F. 2d at 861:

"... (T)he payments to Grimes were made in the course of interstate commerce because they created influences intrastate which injured the free competitive interstate commerce in fish food outside Idaho. The concept to which we refer is something more than the broader test of 'affecting interstate commerce', which is applied under the Sherman Act. Critical here is the fact that Rangen's payments to Grimes gave it a definite advantage in its own interstate dealings—the 'beneficiary' was its interstate business—and therefore the payments must be regarded as having been made in the course of its own interstate commerce."

Since the Sherman Act standard "affecting interstate commerce" is conceded by the language of the decision to be broader in scope than the Robinson-Patman's requirement that the violation of its terms occur "in" commerce, it logically follows that the jurisdictional requirements of the Sherman Act are met if it can be shown that a defendant derived a definite advantage in its own interstate dealings.

C. The Plaintiff Does Not Have to Directly Engage in Trade Across State Lines.

The Ninth Circuit in *Page v. Work*, *supra*, 290 F. 2d at 330, stated that the crucial test for a private anti-trust litigant was: "... not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." However, the principle that a private litigant must prove an effect on the

interstate aspect of his business was departed from in *Washington State Bowling Prop. Ass'n v. Pacific Lanes, Inc.*, (9 Cir. 1966) 356 F. 2d 371, 379, in which the appellate court stated that jurisdiction could be upheld on two alternative grounds:

“* * * In this case the district court submitted two special interrogatories to the jury on the question of interstate commerce; one asking whether the acts of the defendants had substantially affected the interstate commerce portion of the plaintiff's business in an amount that was more than insignificant (Int. No. 3; C. T. 223), and another asking whether the acts of defendants substantially affected interstate commerce and that the amount of commerce affected was not insignificant (Int. No. 4; C. T. 223). A ‘yes’ answer to either would be adequate to sustain a finding of jurisdiction in the district court for the whole case. The jury answered ‘yes’ to both interrogatories.”

In *Washington State Bowling Prop. Ass'n v. Pacific Lanes, Inc.*, *supra*, 356 F. 2d at 379, reference is made to Eiger, Commerce Element in Federal Antitrust Litigation, 25 Fed. B. J. 282, 293 (1965). That article criticized *Page v. Work*, *supra*, as incompatible with the United States Supreme Court decision in *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959). The article stated, 25 Fed. B. J. at 296-297:

“The essence of *Klor's* is that private plaintiffs ought not to be burdened with proving the effects of a per se offense which, in a Government action, exist, as a matter of law, from the fact of the violation. The policy expressed in *Klor's* appears to require that the same jurisdictional test be

applied to Government and private actions. Congress wrote the treble damage action into the anti-trust laws in part as an instrument of enforcement, and it is inconsistent with that objective to impose upon a private suitor a burden not demanded of the Government.

"With *Klor's* and *Page* in mind, note the holding in *Gardella v. Chandler*. The plaintiff, a baseball player, had been barred from the sport by both major leagues. Baseball itself had previously been specifically held by the Supreme Court to be a local activity. This fact notwithstanding, two judges found an effect on interstate television and radio broadcasts of the games and the interstate movement of baseball equipment. Judge Hand was of the opinion that baseball was only *pro tanto* subject to the antitrust laws to the extent of its association with related interstate businesses. Judge Frank, however, refused to accept even this limitation, holding that, so long as there was a relationship with commerce of more than a *de minimus quantum*, the entire industry fell within the purview of the act.

"As the earlier discussion indicates, Sherman Act jurisdiction is defined by the relationship between the violation and interstate commerce. If the *Klor's* thesis is to be given full effect, the commerce determination surely cannot be grounded upon the identity of the plaintiff, or whether the illegal acts affect the interstate commerce phase of the plaintiff's business. The test is whether unlawful activity affects the ability of the business to participate in interstate trade, either as a producer

or distributor of goods moving in commerce or as the local recipient of related goods from other states. Just as there is a danger of extending the concept of commerce to embrace every conceivable violation no matter how local, so, on the other hand, the *Page* decision, if carried to its logical extreme, would virtually repeal the statute which makes treble damage remedy available to '(a)ny person' injured by an antitrust violation. By requiring that the plaintiff prove an effect on the interstate aspect of his business, *Page* in effect denies relief to a businessman who either does not directly engage in trade across state lines or cannot claim direct injury to such trade. The specific conduct which injured the plaintiff may itself have been purely local, but the local nature of the violation does not immunize it if prior or later interstate trust in goods is affected.

"The application of the *Klor's* principle to commerce problems would not relieve a private litigant of the duty to allege and prove facts which establish a basis for his suit. It would, however, however, put him on the same footing as the Government. Thus, for example, purely personal services for customers after they have ended a journey across state lines would be without the Act in either Government or private suit. On the other hand, a manufacturer's conduct which forces a local dealer to illegally maintain prices affects the flow of commerce in the particular goods, and that effects is not diminished nor is it less significant to antitrust enforcement because a retailer-purchaser, rather than the Government, seeks relief

under the Act. Similarly, if a local builder of homes who does no interstate business at all is victimized by a price fix of the *Las Vegas* or *Employing Plasterers* variety, he should not be barred from Sherman Act relief. However, even *Page* theory which requires injury to the interstate aspect of the plaintiff's business, the builder would be barred from recovery because he has no interstate business. The *Page* thesis has run into opposition in at least two district courts, one of them the Ninth Circuit. In *A. B. T. Sightseeing Tours, Inc. et al v. Gray Line New York Transportation Corp.*, the Court held that because New York City sightseeing companies purchase substantial amounts of equipment and solicit business from out of state, a violation could affect commerce as alleged in the complaint. In *Cathay Mortuary-Wah Sang v. Funeral Directors of San Francisco, Inc.*, the movement of funeral equipment from outside California to a local funeral parlor was held sufficient to satisfy the Sherman Act in a private suit charging exclusion from a local funeral directors association. Interestingly enough, the District Court cited the decisions in *Las Vegas* and *Northern California Pharmaceutical* (both Government suits) and ignored *Page*.

"If consistency in antitrust enforcement is a desirable objective, commerce in a private action should rest upon the relationship between the unlawful conduct and the movement of the goods across state lines, without regard to whether the plaintiff is the Government or a private party."

In *Utah Gas Pipelines Corp. v. El Paso Natural Gas Co.*, (D. Utah 1964) 233 F. Supp. 955, 961, it is stated:

“* * * The Congressional intent is broad enough to cover the local entrepreneur opposed by interstate combinations conspiring to preserve their existing market positions and accomplish future market encroachments. While in *Mead's*, the more limited reach of the Robinson-Patman Act was involved, in the Sherman Act Congress left no area of its constitutional power over interstate commerce unoccupied, *United States v. Frankfort Distilleries*, 324 U.S. 293, 65 S. Ct. 661, 89 L. Ed. 951 (1945). Intrastate activities may apply the pinch illegally upon interstate commerce. *United States v. Women's Sportswear Mfg. Ass'n.*, 336 U.S. 460, 69 S. Ct. 714, 93 L. Ed. 805 (1949). And victims in a position to complain of interstate monopolies or conspiracies are not limited to those conducting wide scale activities. *Klor's, Inc. v. Broadway-Hale Stores*, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959).”

III.

THERE WAS A GENUINE FACTUAL ISSUE WHETHER THE DEFENDANTS HAD ESTABLISHED A CUSTOMER RELATIONSHIP WITH A DISTRIBUTOR OF A PARTICULAR GARBAGE PICK-UP EQUIPMENT MANUFACTURER OF SUCH A NATURE THAT INTERSTATE COMMERCE IN EQUIPMENT DISTRIBUTION WAS AFFECTED BY THE TRADE PRACTICES COMPLAINED OF.

Appellant incorporates herein by reference Paragraph D (3) of the Statement of Facts, *supra*, to show the evidentiary facts pertaining to the customer relationship between defendant and Arata Pontiac, as a distributor of Leach equipment, a product in competition with other products in interstate commerce. The inference

may be drawn that a favored relationship reciprocal in character existed between them. Inevitably the removal of independents from Clark County, Nevada, would leave the defendants as the sole outlet for hundreds of thousands of dollars worth of equipment and would thus make it more difficult for competing brands of equipment not distributed or favored by Arata Pontiac to find outlets in the Clark County, Nevada, market.

In *Burke v. Ford*, 389 U.S. 320, 88 S. Ct. 443, 444, 19 L. Ed. 2d 554 (1967), it is stated:

"The Court of Appeals held that proof of a state-wide wholesalers' market division in the distribution of good retained in substantial volume within the State but produced entirely out of the State was not by itself sufficient proof of an effect on interstate commerce. We disagree. Horizontal territorial divisions almost invariably reduce competition among the participants. *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136; *United States v. Sealy, Inc.*, 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238. When competition is reduced, prices increase and unit sales decrease. The wholesalers' territorial division here almost surely resulted in fewer sales to retailers—hence fewer purchases from out-of-state distillers—than would have occurred had free competition prevailed among the wholesalers. In addition the wholesalers' division of brands meant fewer wholesale outlets available to any one out-of-state distiller. Thus the state-wide wholesalers' market division inevitably affected interstate commerce."

Wholly intracounty acts may be found to have had a substantial effect on interstate commerce. *Bank of Utah v. Commercial Security Bank*, (10 Cir. 1966) 369 F. 2d 19, 23.

See: *Otto Milk Company v. United Dairy Farmers Coop. Ass'n*, (3 Cir. 1967) 388 F. 2d 789, 798.

IV.

THERE WAS A GENUINE FACTUAL ISSUE WHETHER DEFENDANTS CARRIED OUT AN ANTI-COMPETITIVE SCHEME THROUGH TRADE PRACTICES, A PART OF WHICH GREW OUT OF PROCEEDINGS BEFORE THE COUNTY COMMISSIONERS ON THE SUBJECT OF AN EXCLUSIVE FRANCHISE FOR GARBAGE PICK-UP AND DISPOSAL SERVICE IN THE UNINCORPORATED AREA OF CLARK COUNTY, NEVADA.

The standard to be applied on a motion for summary judgment is analogous to that used on a motion for a directed verdict. *American Mfrs. M. I. Co. v. American Broadcasting-Para. Th.*, *supra*, 388 F. 2d at 279.

This Circuit has reversed a directed verdict on the issue of intent to monopolize, even though the proof as to each of specific acts may be insufficient in itself to establish unlawful intent, because this Circuit recognized that "the jury must look at the 'whole picture', weigh the contradictory evidence and inferences and draw the 'ultimate conclusion as to the facts'." *Case-Swayne Co. v. Sunkist Growers, Inc.*, (9 Cir. 1966) 369 F. 2d 449, 459, reversed on other grounds, 389 U.S. 384, 88 S. Ct. 528, 19 L. Ed. 2d 621 (1967); see *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, (8 Cir. 1966) 368 F. 2d 679, 691.

The practices of the defendants must be considered collectively in conformity with the dictates of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777, 784 (1962).

The plaintiff in the case at bar can rely upon the collective consideration of the following acts and practices: Early attitude of hostility toward independents, *American Medical Ass'n v. United States*, 76 App. D.C. 70, 87, 130 F. 2d 233, 250 (1942), *aff'd*, 317 U.S. 519, 63 S. Ct. 326, 317 U.S. 519 (certiorari limited to other issues); acquisitions accompanied by covenants against competition prior to the entry of Sun Valley into business, *Bausch Machine Tool Co. v. Aluminum Co.* (2 Cir. 1934) 72 F. 2d 236, 239-240; existence of the scheme before the entry of Sun Valley into business, *Continental Ore Co. v. Union Carbide & Carbon Corp.*, *supra*, 370 U.S. at 709-710; persistent unprofitable sales below cost, *Utah Pic Co. v. Continental Baking Co.*, 386 U.S. 685, 696, Fn. 12, 87 S. Ct. 1326, 1332-1333, Fn. 2, 18 L. Ed. 2d 406 (1967); the use of "deep pocket" financial power based on a monopoly, *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, *supra*, 368 F. 2d at 691; unjustified territorial price reduction, *Utah Pic Co. v. Continental Baking Co.*, *supra*, 386 U.S. at 694, 87 S. Ct. at 1332; the use of unreliable accounting records, *Sanitary Milk Producers v. Bergjans Farm Dairy, Inc.*, *supra*, 368 F. 2d at 691; expectation of reciprocal favored treatment, *Milgram v. Loew's, Inc.*, (3 Cir.) 192 F. 2d 579, 585, cert. denied, 343 U.S. 929; use of lawful monopoly power to create monopoly power in a separate but related field in which a monopolistic regulated industry is not the state policy, *Sir Twenty-Nine Productions, Inc. v. Rollins Tele-casting Inc.*, (5 Cir. 1966) 365 F. 2d 478, 483.

The appellant incorporates herein by reference Paragraph D (1)(d) and (e) of the Statement of Facts, *supra*, which recites evidentiary support for the conclusion that the defendants carried out an anticompetitive scheme through trade practices, a part of which grew out of proceedings before the County Commissioners on the subject of an exclusive franchise for garbage pick-up and disposal in the unincorporated area of Clark County, Nevada.

The District Court erroneously disregarded the injurious impact of the defendants' private commercial activities without reference to the proceedings conducted by the County Commissioners on the subject of the exclusive franchise for a garbage pick-up and disposal service in the unincorporated area of Clark County. *Woods Exploration & Pro. Co. v. Aluminum Co. of America*, (S.D. Tex. 1963) 36 F.R.D. 107, 112.

V.

MISREPRESENTATIONS IN A BID FOR AN EXCLUSIVE FRANCHISE RESULTING IN THE REJECTION OF COMPETING BIDS AND THE ISSUANCE OF THE FRANCHISE AND THE SUBSEQUENT USE OF THE FRUITS OF SUCH CONDUCT FOR THE PURPOSE OF EXCLUDING COMPETITION MAY, IN TOTAL, BE FOUND TO CONSTITUTE PART OF A BROADER SCHEME VIOLATIVE OF THE ANTITRUST LAWS WITHOUT AN ATTACK ON THE FRANCHISE.

The court below held that one of the plaintiff's claims which finds inferential support in the evidence is that misrepresentations were made in Clark Sanitation's proposal for the exclusive franchise for the garbage pick-up and disposal service in the unincorporated area of

Clark County, Nevada [R. 1094]. The evidentiary facts are set forth in Paragraph D (5) of the Statement of Facts, *supra*. A deliberate overstatement is fraud on the government body. *United States v. Neifert-White Co.*, U.S., 88 S. Ct. 959, 19 L. Ed. 2d 1061 (1968). The court below also held that the ultimate award of the franchise to Clark Sanitation is what enabled the defendants to gain monopolistic control of the garbage disposal business in the unincorporated area of Clark County [R. 1095].

The evidence shows that on March 11, 1965, six days after the award of the franchise, Clark Sanitation sent to Sun Valley's customers a printed form letter, stating that on March 5, 1965 the Board of County Commissioners did award the exclusive contract to Clark Sanitation and soliciting not only the pick-up account, but also a container rental account [R. 1121-35].

The court below concluded that, if the franchise was unlawfully granted, the remedy is to attack the franchise [R. 1098]. In that last conclusion, the District Court fell into basic error, viewed against the legal standard that misrepresentations in a bid for an exclusive franchise resulting in the rejection of competing bids and the issuance of the franchise and the subsequent use of the fruits of such conduct for the purpose of excluding competition may, in total, be found to constitute part of a broader scheme violative of the antitrust laws without an attack on the franchise.

The right to conduct the garbage disposal business in the unincorporated area of Clark County, Nevada, and the right to competitively bid for the franchise was a common right of all citizens prior to the award of an

exclusive franchise by the County Commissioners. Bids were to be submitted and considered in an economic framework. A restriction of that common right was effectuated by fraud. The public has a paramount interest in seeing that a restriction of a common right springs from a background free from fraud.

In *Woods Exploration & P. Co. v. Aluminum Co. of America*, (S.D. Tex. 1963) 36 F.R.D. 107, and *Woods Exploration & P. Co. v. Aluminum Co. of America*, (Tex. 1964) 382 S.W. 2d 343, a summary judgment was denied in an antitrust claim that defendants had submitted false nominations (oil and gas forecasts that are filed with a state regulatory agency, the Texas Railroad Commission) to obtain oil and gas allowables, *i.e.*, the right to produce oil and gas from a common source of supply, as part of a broader scheme to eliminate the plaintiffs as independent oil and gas producers. In both cases, it was held that it was not necessary to attack the validity of the order of the Railroad Commission granting the allowables and that the state commission's order remained unaffected by a finding that the submission of false nominations was part of an anti-competitive conspiracy and that the submissions of false nominations was private commercial activity, distinguishable from political activity or lobbying, and was therefore not immune from the antitrust laws.

The distinction between a public body's decision in an economic framework governed by market mechanisms subject to the antitrust laws and a political decision resulting from lobbying exempt from the antitrust laws is the subject of the Note, *Application of the Sherman Act to Attempts to Influence Government Action*, 81 Harv. L. Rev. 847 (1968).

In *American Cyanamid Company v. F.T.C.*, (D.C. Cir. 1966) 363 F. 2d 757, 769-770, it was held that the Federal Trade Commission had jurisdiction over the act of obtaining a patent by misrepresentation and the subsequent use of the patent so obtained—the fruits of such conduct—for the purpose of excluding competition, because the acts, in total, may be found to be an unfair method of competition violative of Section 5 of the Federal Trade Commission Act. It was further held that the proceeding was not an indirect attack on the validity of a patent and that the Federal Trade Commission Act contains no statutory exemption of Patent Office Proceedings. It was finally held that the Commission was not “second guessing” the Patent Office, because the Commission had before it evidence which it found to have been withheld from the Patent Office and passed upon a situation which the Patent Office never knew existed.

Reliance by the appellees on *Parmelee Transportation Company v. Keeshin*, (7 Cir. 1961) 292 F. 2d 794, cert. denied, 368 U.S. 944, 82 S. Ct. 376, 7 L. Ed. 340 (1961), is misplaced. In that case the cause of action was not based on economic activity, but on bribery of a governmental official, who in turn influenced the decision of railroad companies that had invited competitive bidding on an exclusive baggage pick-up contract. There was no private commercial activity in an economic framework. It was stated in the majority opinion, 292 F. 2d at 803-804:

“No interested bidder for the contract was prevented from competing for it. . . . The competition between plaintiff and Transfer was always intense and finally became feverish The case made out by plaintiff’s offers of proof and evidence re-

flects the unusual attention which high officials of the railroads bestowed upon the bidding. An assertion that the competitive market for this contract was destroyed or that the competition for it was eliminated is belied by the record. While one competitor succeeded and necessarily the other failed, unmistakably there was very strenuous competition. This unavoidable fact undermines the plaintiff's charges under §§ 1 and 2 of the Sherman Act. Nor is this result precluded by the fact that the victory of the successful bidder was made easier by the wrongful conduct of a public official."

However, there was a dissenting opinion which stated, 292 F. 2d at 806:

"The majority opinion apparently recognizes that under the *Yellow Cab* case, a conspiracy among sellers of transfer service is illegal. I am aware of no reasonable basis for holding that an identical conspiracy between a group of buyers, a public official and one seller is not likewise proscribed."

The court below appears to have relied on the principle that it should not sanction a collateral attack upon the official acts of public authorities in a litigation to which the authorities are not parties and that, until a direct attack has been successfully made and the contrary shown, it must be assumed that the action of the public officials was a proper exercise of their official powers. Cf. *Brandt v. Winchell*, 3 N.Y. 2d 628, 170 N.Y.S. 2d 828 (1958).

However, the defendants should not be absolved from liability by official action where they have themselves artfully contrived and strategically maneuvered

the plaintiff into the precarious position which renders the plaintiff subject to governmental action. The defendants' activity was the prime producing cause of the conditions leading to the award of an exclusive franchise to Clark Sanitation.

R. J. Collet, president of the appellant, testified in his deposition, when asked whether he thought the Commissioners acted within the scope of their authority in awarding the franchise [R. 4611]:

"I don't think that that is what my case is all about. I think that I am approaching this from the standpoint that there was a situation created that brought about the invitation for a franchise and what not. This is my objection to the method that the franchise was actually—bid was actually originated. The entire situation from the inception of the—even the thought of granting a franchise in the County. I don't think that I have got any real quarrel with the County Commissioners. I am not quarreling with them. I am saying that my competitor created the situation."⁴

R. J. Collet then added, "I don't profess to know anything about law, whatsoever. I don't stay on top of the laws." [R. 4611-4612].

⁴The declarations of the plaintiff as to a conclusion of law, opinion, legal contention or argument, as distinguished from a statement of fact, are not deemed admissions. *Philaboard Paper Prod. Corp. v. East Bay Union of Mach.* 227 Cal. App. 2d 675, 39 Cal. Rptr. 64, 85-86 (1964). Therefore, appellant has argued in Propositions VI, VII and VIII, *infra*, that the grant of the franchise by the County Commissioners was action in excess of the outer perimeter of statutory authority, regardless of the Collet declarations quoted herein. Furthermore, the true meaning of the declaration is that the damage suit has not named the County Commissioners as defendants, but has been directed against the private members of the unlawful combination.

In *United States v. General Electric Co.* (D.N.J. 1949) 82 F. Supp. 753, 851-852, it was recognized that a public body which invites competitive bidding on lamps has the authority to require "Mazda" lamps even if the lamps are procurable from only one source or a limited number of sources, but that if two manufacturers as part of a scheme to exclude competition from public business participate in the preparation of specifications which are drawn for the purpose of precluding competitors from submitting a responsive bid and then bid for the government contract, such conduct may be found subject to the antitrust laws. For the form of the decree, see *United States v. General Electric Co.*, (D.N.J. 1953) 115 F. Supp. 835, 858.

In *De Long Corporation v. Lucas*, (S.D.N.Y. 1959) 176 F. Supp. 104, 123, affirmed (2 Cir. 1960) 278 F. 2d 804, 810, the defendant breached a two-year covenant not to compete, thereafter submitted a bid for a government contract and thereafter was awarded the contract. The Court held that the breach of the covenant against competition was the proximate cause of the plaintiff not being awarded the government contract, despite the fact that actual bidding took place after the restricted period had expired.

In *Pedersen v. United States*, (D. Guam 1961) 191 F. Supp. 95, the Court recognized the tort of interference with the prospective advantage of a bidder for a government contract by supplying false information to the public official charged with the responsibility of awarding the contract.

In *Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co.*, (5 Cir. 1954) 214 F. 2d 413, 418, which recognized the immunity from the antitrust laws of influencing valid governmental action, the Court stated:

"In the case mainly relied on by the appellant, *Angle v. Chicago, St. Paul, etc., Railway Co.*, 151 U.S. 1, 14 S.Ct. 240, 38 L.Ed.55, the plaintiff's legal rights had been violated because the defendant had wrongfully induced another company to break its contract with plaintiff with resultant damages independent of the Legislature's action."

It is clear that the bids were to be considered in an economic framework governed by market mechanisms.

In *Yohe v. City of Lower Burrell*, 418 Pa. 23, 208 A. 2d 847, 850 (1965), the Supreme Court of Pennsylvania explained the reason for the statutory requirement for competitive bidding before a contract for garbage pick-up and disposal service can be granted by a governmental body:

"The need for bidding requirements is just as compelling in the instant case where the garbage collector is compensated directly by the recipients of his service as it is when the recipients pay for service through the conduit of the municipal treasury. In each case, regardless of who makes the final payment, it is the taxpaying citizen who provides the necessary funds and whose interest must be protected . . . The language of the Act compels the interpretation that competitive bidding is required on these contracts even though the money

comes directly from the taxpayers rather than from the city treasury. It has been argued that bidding deprives a city council of its discretion to evaluate the responsibility or competency of each applicant and forces a council to base its award upon how much a potential garbage collector asks for his services. This argument . . . ignores the control which a city maintains over bidders through appropriate specifications, . . . and through contractual provisions.”

In *Price v. Philadelphia Parking Authority*, 422 Pa. 317, 221 A. 2d 138, 147, Footnote 26 (1966), in which it was decided that a statute imposed the requirement of competitive bidding by the use of the words “on a fair competitive basis”, referring to a contract to be granted by a public body, the Court added:

“Our conclusion that the duty to employ competitive bidding is imposed by the Act is reinforced by consideration peculiar to air-right leaseholds. Due to their recent advent, standards by which such leaseholds may be valued have not yet evolved. By requiring competitive bidding, the Legislature has established a method by which the ‘market-place’ will operate to ensure that such leases are not entered into in an arbitrary and capricious manner, whether by reason of favoritism or good faith mistakes in valuation.”

VI.

THERE WAS A GENUINE FACTUAL ISSUE WHETHER THE PROCEDURES ADOPTED BY THE COUNTY COMMISSIONERS DESTROYED THE FREE COMPETITION ON A COMMON BASIS THE STATE STATUTE DEMANDED, AND A FRANCHISE GRANTED IN VIOLATION OF THE STATUTORY REQUIREMENT WOULD BE ACTION BEYOND THE OUTER PERIPHERY OF STATUTORY AUTHORITY AND THEREFORE WITHOUT IMMUNITY FROM THE ANTITRUST LAWS.

The court below held that one of the plaintiff's claims which finds inferential support in the evidence is that the procedures adopted for award of the franchise were illegal [R. 1094]. The memorandum opinion did not particularize the illegalities. The court below concluded that, if the franchise was unlawfully granted, the remedy is to attack the franchise [R. 1098]. The memorandum opinion was silent as to whether the franchise could be attacked as part of a private antitrust action and, if so, upon what grounds.

It has been held that in a common-law action for damages by the holder of a franchise for loss of profits resulting from the operation by a competitor in excess of statutory authority, the plaintiff has a right to attack the legality of the defendant's operation and show it is action beyond the outer periphery of statutory authority.

In *Menzel Estate Co. v. City of Redding*, 178 Cal. 475, 174 Pac. 48 (1918), the defendant City of Redding was held liable for loss of profits resulting from the erection of a bridge in competition with a ferry concluded by the plaintiff under an exclusive franchise. The defendant contended that its bridge was authorized

under its declaration of public convenience, but it was held that the City of Redding had no statutory authority to make such a declaration of public convenience and thus attempt to violate the franchise of an existing ferry. The Court stated, 174 Pac. at 51:

"The city of Redding therefore is in essentially the same position which a private individual would occupy, if without warrant of law he had constructed the bridge and injured the property of the respondents."

In *East Bay Garbage Co. v. Washington Tp. Sanitation Co.*, 52 Cal. 2d 708, 344 P. 2d 289 (1959), the plaintiff was held liable on a counterclaim by the defendant, who held an exclusive franchise for garbage pick-up and disposal in Fremont, California, for loss of profits resulting from a competing operation by the plaintiff. The plaintiff contended in opposition to the counterclaim that its operation was authorized under a prior contract with a sanitary district whose boundaries encompassed Fremont, California. The contract between the plaintiff and the sanitary district was awarded without competitive bidding required by state statute, and so the plaintiff's competitive operation was held to be in excess of statutory authority. To the plaintiff's contention that the plaintiff's contract could be attacked only by a direct proceeding in *quo warranto*, the Supreme Court of California answered, 344 P. 2d at 292:

"(Plaintiff) cannot properly object to defendant's attack on the validity of such contract coincident with defendant's assertion of a legal right to the garbage collection privilege in the area in question."

The plaintiff in the case at bar has a primary right not to have its business injured by a pattern of conduct violative of Sections 1 and 2 of the Sherman Act. In a private antitrust action to enforce that primary right by the remedy of damages, where the injury results from a pattern of conduct which would be unlawful but for a defendant's contention that its conduct was state-directed, the plaintiff has a right to show that the injurious conduct was carried out in excess of statutory authority and was therefore not state-directed.

In *Alabama Power Co. v. Alabama Electric Cooperative, Inc.*, (5 Cir. 1968) 1968 CCH Trade Cases ¶ 72,398, a privately owned electric utility invoked the anti-trust laws to challenge the requirement in the grant of a Rural Electrification Administration (REA) loan to a generation and transmission co-operative that the borrower shall obtain 35-year contracts with its distribution members obligating them to purchase all of their electric requirements to the extent that the borrower shall have power and energy available. The plaintiff showed that in certain instances the co-operative distributors would purchase all or part of their power supply from it. However, the "all requirement contracts" required the distribution co-operative to terminate, at such time as it might legally do so, its contracts with other power suppliers upon request of the generation and transmission borrower made with the approval of, or at the direction of, the Administrator. The defendants showed that the Rural Electrification Administration had followed a customary and long-established practice of requiring that its borrowers enter into 35-year-old-requirement contracts with the distribution co-operatives as security for the repayment of the loan

over a period of 35 years and that the REA had discretionary authority under the governing statute to determine what was adequate security for the loan. The majority opinion concluded that, since the Rural Electrification Administration had statutory authority to determine in its discretion what was adequate security and its practice was to exercise discretion as it did in this case, the agency's determination that its requirement in the loan carried out the statute was conclusive and the only legal conclusion the court could reach was that the action of the Rural Electrification Administration was clearly not beyond the outer perimeter of statutory authority. Thus, the majority opinion never reached the issue whether the plaintiff could in the antitrust action attack the agency requirement as action in excess of statutory authority.

The majority opinion, however, did add, 1968 CCH Trade Cases at page 85, 209:

"A different question might be presented if the Administrator went beyond the outer perimeter of the authority vested in him by the statute, or as expressed in *Hardin v. Kentucky Utilities Co.*, cited *supra*, note 3, '* * * outside the range of permissible choices contemplated by the statute.' "

The dissenting opinion, holding that there was evidence that the loan was made in violation of the "central station service" limitation contained in Section 4 of the REA Act and that a genuine factual issue existed, therefore, on the question whether the action exceeded

the outer perimeter of authority, stated, 1968 CCH Trade Cases at pages 85, 217:

"The majority acknowledge a possible application of the antitrust laws if the Administrator went beyond the outer perimeter of the authority granted him by statute."

In *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682, 689-690, 69 S. Ct. 1457, 93 L. Ed. 1628 (1949), it is stated:

"... (W)here the officer's powers are limited by statute, his actions beyond those limitations are considered individual and not sovereign actions. The officer is not doing the business which the sovereign has empowered him to do or he is doing it in a way which the sovereign has forbidden. His actions are *ultra vires* his authority and therefore may be made the object of specific relief."

"The fundamental reason why persuading a sovereign power to do this or that cannot be a tort * * * is that it is a contradiction in terms to say that, within its jurisdiction, it is unlawful to persuade a sovereign power to bring about a result that it declares by its conduct to be desirable and proper."

American Banana Co. v. United Fruit Co., 213 U.S. 347, 358, 29 S. Ct. 511, 513, 53 L. Ed. 826, 833 (1909).

Conversely, where the action brought about is in excess of authority, the sovereign has not declared it proper and it can be a tort to bring it about, thereby removing the immunity from the antitrust laws. Cf. *S & S Logging Co. v. Barker*, (9 Cir. 1966) 366 F. 2d 617.

A federal court whose jurisdiction has been invoked under the antitrust laws has a duty to decide questions of state law when necessary to the rendition of a judgment, especially where good cause does not appear for postponing the exercise of federal jurisdiction pending determination by a state court of a controlling question of state law. *Mach-Tronics, Incorporated v. Zirpoli*, (9 Cir. 1963) 316 F. 2d 820, 824; *Cf. Tomiyasu v. Golden*, (9 Cir. 1966) 358 F. 2d 651; *White v. Husky Oil Company*, (D. Mont. 1967) 266 F. Supp. 239.

In the authorities cited in the memorandum opinion of the court below, the governmental action which furnished immunity from the antitrust law was clearly valid governmental action in compliance with state law. In the case at bar, by contrast, there was a genuine factual issue remaining for trial whether the bidding procedures referred to by the court below as illegal in practical effect destroyed the free competition on a common basis which the statute demanded. A court is prohibited from "overlook(ing) the necessity of inquiry beyond the form." *American Federation of Musicians v. Carroll*, 88 S. Ct. 1562, 1568 (1968).

Appellant incorporates herein by reference Paragraph D(4)(c) of the Statement of Facts, *supra*, which recites the inferential evidentiary support for the conclusion that the competitive bidding required by the statute was destroyed. The bid documents, the bid variables and the conditions of bidding were tailored to handicap bidders other than Clark Sanitation. Under such circumstances, the franchise would be null and void. In Nevada, violation by County Commissioners of a statutory requirement of competitive bidding is action beyond the outer perimeter of authority.

The Supreme Court of Nevada stated in *Sadler v. Eureka County*, 15 Nev. 39, 42 (1880):

"The powers of the commissioners and the mode of exercising them, being derived from the statute must necessarily depend upon its true construction.

"The restrictive provisions of the statute were evidently inserted for the protection and benefit of the public, and were intended to guard against favoritism, extravagance, or corruption in the letting of contracts for any public work. When the commissioners act under such authority, they must strictly follow all the conditions under which the authority is given.

"The law is well settled that county commissioners can only exercise such powers as are especially granted, or as may be necessarily incidental for the purpose of carrying such powers into effect; and when the law prescribes the mode which they must pursue, in the exercise of these powers, it excludes all other modes of procedure."

See *State v. Boerlin*, 30 Nev. 473, 98 Pac. 402 (1908); *State v. Haeger*, 55 Nev. 331, 33 P. 2d 753 (1934); *Canton v. Frank*, 56 Nev. 56, 44 P. 2d 521 (1935).

The same principle is well established in California, where it has been held as follows: An implied liability to pay on *quantum meruit* for benefits received by a governmental body could not exist, where the statute prohibited against contracting in any other manner than as prescribed therein and the statutory prohibition was disregarded; compliance with a statute was mandatory and adoption of a mode prescribed in a statute was a juris-

dictional prerequisite to the exercise of the power to contract at all and disregard of the prescribed mode would make the contract void; where a governmental body has disregarded the mode prescribed by statute, liability could not arise by estoppel or ratification; a person dealing with a public body is chargeable with knowledge of the limitation of its authority; and, when he deals in matters expressly provided in a statute, he is bound to see that the charter is complied with. *Zottman v. City and County of San Francisco*, 20 Cal. 96; *Reams v. Cooley*, 171 Cal. 150, 152 Pac. 293 (1915); *Miller v. McKinnon*, 20 Cal. 2d 83, 124 P. 2d 34, 140 A.L.R. 570 (1942); *Dynamic Industries Company v. City of Long Beach*, 159 Cal. App. 2d 204, 323 P. 2d 768 (1958).

It is stated in *Reams v. Cooley*, *supra*, 152 Pac. at 294:

“ . . . (T)he decided weight of authority is to the effect that, when by statute the power of the board or municipality to make a contract is limited to a certain prescribed method of doing so, and any other method of doing it is expressly or impliedly prohibited, no implied ability can arise for benefits received under a contract made in violation of the particularly prescribed statutory mode. Under such circumstances the express contract attempted to be made is not invalid merely by reason of some irregularity or some invalidity in the exercise of a general power to contract, but the contract is void because the statute prescribes the only method in which a valid contract can be made, and the adoption of the prescribed mode is a jurisdictional prerequisite to the exercise of the power

to contract at law, and can be exercised in no other manner so as to incur any liability on the part of the municipality."

The County Commissioners have no authority delegated by statute to formulate procedures that handicap bidders. Where such procedures have been adopted, a legal duty has not been validly undertaken. The activity of the County Commissioners is not suggestive of, or peripheral to, specific delegated authority. Therefore it is beyond the outer perimeter of an official line of duty.

The governing state statute, NRS 244.187, from which the County Commissioners derive their authority to grant an exclusive franchise for garbage pick-up and disposal service in an unincorporated area has been interpreted by the decision of the lower state court of Nevada to require competitive bidding as the method by which the County Commissioners must proceed to grant such a franchise.

A federal court treats with respect a decision of a lower state court in the absence of decisions of the highest appellate court of the state showing that the state law is other than that announced by the lower court. *Commissioner v. Bosch*, 387 U.S. 456, 465-466, 476, 87 S. Ct. 1776, 18 L. Ed. 2d 886, 893-894, 900 (1967).

In the state court decision rendered January 16, 1963, in the case entitled *Sun Valley Disposal Co., Inc. v. Harley Harmon, et al.*, Case No. 111634, in the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, the District Judge held [R. 1121-250 to 251]:

"* * * Defendants assume the position that competitive bidding is not required by the statute.

We might agree that such is not spelled out in words of one syllable, however, the statute will admit of no other construction than that bids or proposals must be considered, and ipso facto, whether it be related to dollars or services, the Commissioners choose the bid or proposal that is most advantageous to the public. The statute reads in part:

‘The Board of County Commissioners shall give full consideration to any application or bid to supply such services, if received prior to the expiration of such 30-day period, and shall grant the franchise on terms most advantageous to the County and the persons to be served.’

“* * *

“Plaintiff’s quarrel rests upon the lack of specifications of any kind so as to establish some basis for competitive bidding. * * * No specifications of any kind were included that would create a standard for competitive bidding. * * *”

The state court’s findings of fact, conclusions of law and judgment were entered April 4, 1963 [R. 1121-255]. The judgment was not appealed from. The conclusions of law rendered by the lower state court were expressly acquiesced in as controlling the procedure to be followed by the County Commissioners in granting an exclusive franchise for garbage pick-up and disposal [R. 1121-361].

Among those conclusions of law was the following [R. 1121-262]:

“10. An enforceable contract was not entered into between the Board of County Commissioners and Defendant, Clark Sanitation, Inc., because Defendant Clark Sanitation, Inc.’s bid could not be lawfully accepted by the Board, since there was no equal opportunity to bid on a competitive basis.”

The governing Nevada statute, NRS 244.187, did not authorize the County Commissioners to eliminate in advance the rate to be charged the public as a bid variable. The statute merely authorized the County Commissioners to fix the rates charged by a franchise holder, which means after the franchise was awarded. In its pertinent part, the statute reads as follows:

“* * *

“2. The board of county commissioners may, by ordinance, regulate such services and fix fees or rates to be charged by the franchise holder.”

The history of the statute in that it was enacted by the Nevada legislature on March 17, 1960 [R. 1003]. On April 5, 1960, the County Commissioners of Douglas County, Nevada, passed a resolution to proceed with an invitation to bid pursuant to the recently enacted statute [R. 1004-1013]. The bid documents show that the franchise fee was fixed in advance as one (1%) percent of the total receipts, but that on the subject of rates the Notice of Intent to Grant Franchise stated [R. 1023-1024]:

“* * *

“3. . . . The initial monthly rate shall be that bid by the person whose bid for the franchise is accepted by the Board of County Commissioners.

“4. The successful bidder shall provide garbage collection and disposal service as herein specified . . . at such uniform rates as are fixed by the Board of County Commissioners. No hearing shall be held to change any rate for garbage collection under this franchise within six (6) months after such rate has been fixed or changed by the Board of County Commissioners after hearing, nor shall the rate for garbage collectors from dwelling houses initially fixed by the ordinance granting

the franchise be modified within one year after the date said ordinance is adopted.”

In the case of Washoe County, Nevada, the bidder was required to state, among other things, “estimates of cost for the collection service and disposal service, separately computed.” [R. 1028]. The bids submitted contained the proposed garbage pick-up charge [R. 1038, 1046].

In the case at bar, involving Clark County, Nevada, the County Commissioners fixed the rates to be charged in advance by Ordinance No. 214 passed June 8, 1964, in Section 15 [R. 1121-353 to 359].

In *Thomas Harrington's Sons Co. v. Mayor, etc., Jersey City*, 78 N.J.L. 610, 75 Atl. 943 (1910), it was held that, where a statute required the garbage contract to be awarded on terms most advantageous to the city,

“this may depend upon a weighing of the relative importance of the difference in the money cost and the difference in favor of the character, experience, and ability to perform the contract of the highest bidder.”

VII.

THERE WAS A GENUINE FACTUAL ISSUE WHETHER THE INVITATION FOR BIDS WAS A SHAM THAT EVADED THE FREE COMPETITION ON A COMMON BASIS THE STATE STATUTE DEMANDED, AND A FRANCHISE GRANTED IN VIOLATION OF THE STATUTORY REQUIREMENT WOULD BE ACTION BEYOND THE OUTER PERIMETER OF STATUTORY AUTHORITY AND THEREFORE WITHOUT IMMUNITY FROM THE ANTITRUST LAWS.

In Proposition VI of the Argument, *supra*, it has been demonstrated how a genuine factual issue has

arisen that the competitive bidding required by the state statute was destroyed. Appellant incorporates herein by reference Paragraphs D (4)(c) and (d) of the Statement of Facts, *supra*. These inferential facts must be viewed against the statement in the memorandum opinion of the court below that one of the plaintiff's claims which finds inferential support in the evidence in that one or more of the County Commissioners favored Clark Sanitation for personal selfish reasons unrelated to the public interest [R. 1094]. There is a triable question whether the invitation for bids was a sham, done only to appear to comply with the law and to clothe the proceedings with the habiliments of legality. *Heyer Products Company v. United States*, 135 Ct. Cl. 63, 140 F. Supp. 409, 413 (1956). The fact-finder may reasonably conclude that the proceeding before the County Commissioners was a subterfuge to evade competitive bidding. See *United States v. Raub*, (7 Cir. 1949) 177 F. 2d 312, 314. Clearly, such a conclusion would render the franchise subject to attack in a private antitrust action not only for the reasons set out in Proposition VI of the Argument, *supra*, but also for the following reason:

"It is a maxim of every country that no man should be judge in his own cause. The learned wisdom of enlightened nations, and the unlettered ideas of ruder societies are in full accordance upon this point, and wherever tribunals of justice have existed, all men have agreed that a judge shall never have the power to decide where he is himself a party. In England it has always been held that, however comprehensive may be the terms by which jurisdiction is conferred upon a judge, the power

to decide his own cause is always a tacit exception to the authority of his office. Such I conceive to be the law of this state." *Wash. Ins. Co. v. Price*, 1 Hopk. Ch. (N. Y.) 1.

A fortiori the County Commissioners have no power to decide that their invitation for bids was a sham.

Where the existence of a fact is an indispensable condition before a board can act and that board is not clothed with the power to find the fact, the question whether the fact exists may be inquired into collaterally. *State v. Porter*, 23 N.M. 508, 169 Pac. 471 (1917); *Kenney v. Bank of Miami*, 19 Ariz. 338, 170 Pac. 866 (1918); *Beardslee v. Dolge*, 143 N.Y. 160, 38 N.E. 205 (1894); *Miller v. City of Amsterdam*, 149 N.Y. 288, 43 N.E. 632 (1896).

VIII.

THERE WAS A GENUINE FACTUAL ISSUE WHETHER THE GRANT OF A FRANCHISE WAS INFLUENCED IN FUTHERANCE OF ANTICOMPETITIVE CONSPIRACY PARTICIPATED IN BY ONE OR MORE COUNTY COMMISSIONERS, AND SUCH CONSPIRATORIAL CONDUCT WOULD BE SUBJECT TO THE ANTITRUST LAWS.

The proof that the invitation for bids was a sham and that one or more County Commissioners favored Clark Sanitation for personal selfish reasons unrelated to the public interest permits the fact-finder to conclude that one or more County Commissioners joined an anti-competitive scheme and in furtherance thereof influenced the grant of the franchise. Such conspiratorial conduct would be subject to the antitrust laws. *Harmon v. Valley National Bank*, (9 Cir. 1964) 339 F. 2d 564;

Bankers Life and Casualty Company v. Larson, (5 Cir. 1958) 257 F. 2d 377; see *Independent Taxicab Operators' Ass'n v. Yellow Cab Co.*, *supra*, 278 F. Supp. at 985; *Eastman v. Yellow Cab Co.*, (7 Cir. 1949) 173 F. 2d 874, 881.

Where the interests of the persons charged to have joined the combination are not divergent and there is no overwhelming evidence of their motive to demonstrate conclusively non-conspiratorial motives, a jury question is presented as to the interested County Commissioners' motives in relation to the issue of joinder of conspiracy and a summary judgment is precluded. *Cf. First National Bank of Arizona v. Cities Service Co.*, *supra*, 88 S. Ct. at 1587.

The court below erroneously concluded that a conspiracy cannot be actionable if it is predicated for its accomplishment upon influence, rightful or wrongful in character, to instigate governmental action and irrespective of whether or not the official is named as a co-conspirator [R. 1097-1098]. The reasons for the erroneous character of the District Court's conclusion are as follows: Firstly, the enlistment of a friendly public official to harass competitors can be a powerful tool in the most vicious sort of anticompetitive effort. Note, *Application of the Sherman Act to Attempts to Influence Government Action*, *supra*, 81 Harv. L. Rev. at 856, Footnote 51. Secondly, there is no authority, statutory or otherwise, authorizing a private outsider to influence an official to join a conspiracy to restrain commerce or exempt them from suit if they do so. *Bankers Life and Casualty Company v. Larson*, *supra*, 257 F. 2d at 381.

CONCLUSION.

The appellant recognizes the legitimate function of the summary judgment rule, that is, to obviate trials which would serve no useful purpose. However, in a recent dissenting opinion, Mr. Justice Black, with whom the Chief Justice and Mr. Justice Brennan joined, has warned:

“The plain fact is that this case illustrates that the summary judgment technique tempts judges to take over the jury trial of cases, thus depriving parties of their constitutional right to trial by jury.” *First National Bank of Arizona v. Cities Service Co.*, *supra*, 88 S. Ct. at 1600.

For the reasons which we have set forth, the summary judgment appealed from should be reversed.

Respectfully submitted,

GALANE & WINES,

By MORTON GALANE,

Attorneys for Appellant.

Certificate.

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

MORTON GALANE.





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No. 22,762

IN THE

**United States Court of Appeals
For the Ninth Circuit**

SUN VALLEY DISPOSAL Co., INC., a corporation,
Appellant,

VE.

SILVER STATE DISPOSAL Co., CLARK SANITATION,
INC., DISPOSAL TRANSPORTATION, INC., HEN-
DERSON DISPOSAL SERVICE, INC., DISPOSAL IN-
VESTMENTS, INC., LESTER L. LAFORTUNE, JOHN
ISOLA, and ALFRED ISOLA,

Appellees.

**On Appeal from the United States District Court
for the District of Nevada**

APPELLEES' BRIEF

I

PRELIMINARY STATEMENT

This is an appeal pursuant to 28 U.S.C. Sections 1291 and 1294(1) from the judgment of the District Court for the District of Nevada entered on February 27, 1968. (R. 1091.)* The Honorable Bruce R.

*The Clerk's record is referred to herein as "R" followed by the appropriate page reference.

Thompson granted summary judgment for Appellees in an action instituted under federal antitrust laws. The Memorandum Opinion is attached as Appendix A, *infra*. (R. 1091a-1099.)

II

STATEMENT OF THE CASE

Appellant Sun Valley Disposal Co., Inc., (Sun Valley) is a Nevada corporation which was engaged in the garbage collection and disposal business in Clark County, Nevada, from approximately January, 1961 to April, 1965. (R. 1121-23 to 1121-24.)

In March, 1965, after a public hearing, the Board of County Commissioners of Clark County awarded a franchise to Appellee Clark Sanitation, Inc. (Clark Sanitation) for the collection of garbage in the unincorporated areas of Clark County. Appellant Sun Valley immediately wrote all customers that it was going to seek an injunction challenging the award of the franchise to Clark Sanitation and that it was continuing to operate in the area encompassed by the franchise for garbage collection despite the action of the Board of County Commissioners. (R. 240.)

On April 4, 1965, a cease and desist order was issued by the District Attorney for Clark County, Nevada, against Appellant Sun Valley to prevent the violation of Clark Sanitation's franchise. Appellant Sun Valley did not attack the franchise and

subsequently discontinued its garbage collection business in Clark County.

On November 19, 1965, Appellant Sun Valley instigated the present litigation by filing a complaint in the United States District Court for Nevada. Thereafter, for over two years, extensive pre-trial discovery was conducted: thirty-four depositions were taken; thousands of documents were produced by the parties and others; four sets of interrogatories were propounded by Appellant Sun Valley and answered by Appellees. The voluminous record now before this Court attests the exhaustive opportunity afforded for discovery.

On June 6, 1966, Appellees moved pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment on the grounds that:

1. The acts complained of were brought about, authorized, sanctioned and approved by an Act of the Legislature of the State of Nevada;
2. The acts complained of did not involve interstate commerce or have an effect on interstate commerce.

After extensive briefing of fact and law, oral argument was heard before Judge Bruce R. Thompson in November, 1967. On February 27, 1968, Appellees' motion was granted and judgment was entered. (R. 1091.) Judge Thompson filed a Memorandum Opinion (R. 1091a-9) with his Order which, after thoroughly discussing the various arguments raised by counsel, held, *inter alia*, that:

- a. The franchise caused the extinction of Appellant's garbage disposal business in Clark County and eliminated competition in the performance of such services; (R. 1094, lines 2-6.)
- b. The franchise is not attacked and is not claimed to be illegal; (R. 1093, lines 20-21, R. 1094, lines 2-3.)
- c. If the franchise for garbage collection was unlawfully granted, the remedy is to attack the franchise; (R. 1098, lines 15-16.)
- d. The activity of Appellees in working with or influencing the Board of Commissioners of Clark County was political activity or lobbying which is protected activity under the antitrust laws; (R. 1093, lines 21-23.)
- e. Although interstate commerce is incidentally involved, the acts or conduct complained of did not affect the interstate commerce of the garbage collection business. (R. 1098, lines 24-27.)

Appellant Sun Valley had successfully attacked the award of a previous franchise and had threatened to challenge the franchise under which Appellee Clark Sanitation now operates. (R. 1093, lines 28-30 and R. 245.) Although both Appellant Sun Valley and its President, as an individual, had submitted bids for this franchise, they did not want any franchise to be awarded. (R. 4611.) Seven months after the franchise was awarded, this antitrust action was filed.

Appellees adopt the statements of material fact advanced by Appellant Sun Valley in its opening brief. This exhaustive chronicle of events will, therefore, not be re-counted here.

On March 1, 1968, this appeal was taken. On March 4, 1968, Appellant Sun Valley filed a law suit in the Eighth Judicial District of Nevada against Clark Sanitation and certain members of the Board of County Commissioners of Clark County attacking the award of the subject franchise. The complaint in that action is attached as Appendix B, *infra*.

III

QUESTIONS PRESENTED

1. Did the District Court err in holding that the granting of an exclusive franchise by the Board of County Commissioners of Clark County was a governmental act which is not within the purview of the federal antitrust laws?
2. Did the District Court err in holding that the acts complained of do not involve interstate commerce or have a substantial and direct effect upon interstate commerce?
3. Did the District Court err in holding that if the franchise was unlawfully granted, the remedy is to attack the franchise?

IV

**APPELLEES' RESPONSES TO THE
SPECIFICATIONS OF ERROR**

Appendix C to this Brief consists of a table which specifically refers to the portions of Appellees' argument which are responsive to each of Appellant's assignments of error.

V

SUMMARY OF ARGUMENT

Appellees contend that the granting of an exclusive franchise by the Board of County Commissioners of Clark County was authorized, sanctioned and approved by an Act of the Legislature of the State of Nevada and an Ordinance of Clark County. These governmental acts constitute conduct which is immune from attack under the federal antitrust laws. *Parker v. Brown*, 317 U.S. 338 (1943); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). *Woods Exploration & Prod. Co. v. Aluminum Co. of America*, 284 F. Supp. 582 (S. D. Tex. 1968); Furthermore, as a matter of law, any acts of Appellees in soliciting or inducing the Board of County Commissioners to act in their favor is not within the purview of the Sherman Act. *Eastern Railroad Presidents' Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961); *United States v. Rock-Royal Co-Operative, Inc.*, 307 U.S. 533 (1939); *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, et al.*, 362 F. 2d 52 (1st Cir. 1966).

Appellees contend that there was no showing that any line of interstate commerce associated with the garbage collection business was substantially or directly affected by any acts or conduct of the parties. Although Appellant and Appellees were involved in various lines of interstate commerce, the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct affects the interstate commerce of such business. (*Page v. Work*, 290 F. 2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1962); *Las Vegas Plumbers Association v. United States*, 210 F. 2d 732 (9th Cir. 1954), *cert. denied*, 348 U.S. 817 (1955).

Appellees contend if the franchise granted by the Board of County Commissioners is invalid, Appellant's remedy is to attack such franchise. If the awarding of the franchise by the Board of County Commissioners in 1965 was a valid governmental act, the doctrine of immunity is applicable. If the franchise awarded pursuant to state enabling legislation and county ordinance is invalid, it must be attacked in the appropriate state court with jurisdiction over the parties. Appellant Sun Valley has recently made such an attack. (*Okfenokee Rural Electric Membership Corporation v. Florida Power and Light et al.*, 214 F. 2d 413 (5th Cir. 1954); *Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 237 (1952); *Tomiyasu v. Golden*, 358 F. 2d 651 (9th Cir. 1966).

When confronted by a motion for summary judgment, Appellant is not permitted to rest upon the

allegations of its pleadings, but is required to set forth specific facts showing that there is a genuine issue for trial. This has not been done, despite full discovery, because it cannot be done. Appellees take issue with none of the facts set forth in Appellant's opening brief. Summary judgment was properly granted to avoid a prolonged and expensive trial. (*First National Bank of Arizona v. Cities Service Co.*, 88 S. Ct. 1575 (1968)).

VI

ARGUMENT

- A. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THE GRANTING OF AN EXCLUSIVE FRANCHISE BY THE BOARD OF COUNTY COMMISSIONERS OF CLARK COUNTY WAS A GOVERNMENTAL ACT WHICH IS NOT WITHIN THE PURVIEW OF THE FEDERAL ANTITRUST LAWS. (Response to Appellant's Assignment of Error Nos. 4, 5 and 8.)**
- 1. Nevada Enabling Legislation Authorized The Granting Of The Franchise.**

The District Court held that it was the granting of the franchise which resulted in "the extinction of [Appellant's] garbage disposal business in Clark County and eliminated competition in performance of such services." (R. 1094.) It was only after the award of the franchise and the issuance of a cease and desist order by the District Attorney that Appellant Sun Valley discontinued its garbage collection business. The gravamen of Appellant Sun Valley's complaint is that this franchise should never have been awarded. As stated in Appellant's brief,

R. J. Collet, President of Appellant Sun Valley, testified on deposition:

"I don't think that that is what my case is all about. I think that I am approaching this from the standpoint that there was a situation created that brought about the invitation for a franchise and what not. This is my objection to the method that the franchise was actually originated. The entire situation from the inception of the—even the thought of granting the franchise in the County. I don't think that I have got any real quarrel with the County Commissioners. I am not quarrelling with them. I am saying that my competitor created the situation." (R. 4611.)

Appellant Sun Valley has not attacked the award of the franchise in this action although it had threatened to do so. Nor has Appellant attacked the validity of the enabling legislation authorizing such franchise. (R. 1093.)

The relevant Nevada State statute is N.R.S. 244.183 which states in material part:

"Franchises for garbage collection and disposal service"

1. Any Board of County Commissioners may grant exclusive franchises to operate garbage collection and disposal services outside the limits of incorporated cities within the County.

2. The Board of County Commissioners may, by ordinance, regulate such services and fix fees or rates to be charged by the franchise holder.

3. A notice of the intention to grant any franchise shall be published once in a newspaper

of general circulation in the County, and the franchise may not be granted until 30 days after such publication. The Board of County Commissioners shall give full consideration to any application or bid to supply such services, if received prior to the expiration of such 30-day period, and shall grant the franchise on terms most advantageous to the County and the persons to be served."

Clark County Ordinance No. 214 was passed in 1964 by the Board of County Commissioners of Clark County pursuant to this enabling statute. (R. 228-234.) The applicability of this legislation to the award of the franchise involved in this litigation is apparent. That such activity by the Board of County Commissioners or Appellees in seeking the award of such franchise is conduct immune from the federal anti-trust laws is also apparent from a brief review of the leading cases.

2. The Granting Of The Franchise Was Conduct Immune From Attack Under The Sherman Act.

In the landmark case of *Parker v. Brown*, 317 U.S. 341 (1943), a raisin producer brought suit to enjoin the State Director of Agriculture, the members of the State Agricultural Prorate Advisory Commission, and others charged by the statute with the administration of the Prorate Act, from enforcing a program for marketing raisins in California. Plaintiff contended, *inter alia*, that the order was illegal because it violated Sections 1 and 2 of the Sherman Act. (U.S.C.

Sections 1, 2.) The Supreme Court held that when the acts complained of are the result of a state act, or legislative fiat, the Sherman Act does not apply so long as the federal government has not pre-empted the field to itself. The Court found nothing in the language of the Sherman Act or in its history which suggested that its purpose was to restrain such conduct. The Court upheld the activity of the officials because upon a consideration of all the relevant facts and circumstances, it appeared that the matter was one which might be appropriately "regulated in the interest of the safety, health, and well-being of local communities," and which, because of its local character and practical difficulties, might never be adequately dealt with by Congress. (*Id.* at p. 362.)

In Clark County, Nevada, the matter which was appropriately regulated in the interest of the safety, health and well-being of the local community was the service of garbage collection and disposal. The Board of County Commissioners as duly elected officials of Clark County were officers or agents of the State. The activity of inviting bids and awarding exclusive franchises was specifically authorized by N.R.S. 244.183, *supra*.

A decision cited by Appellant Sun Valley as authority for its position has subsequently been modified to grant summary judgment in an antitrust action on the same issues as are here involved. In finding for defendants in *Woods Exploration & Prod. Co. v. Aluminum Co. of America*, 284 F. Supp. 582 (S.D. Tex. 1968), the District Court gives a lucid summary

of the *Parker v. Brown* doctrine *supra*. Plaintiffs and defendants were engaged in the production and marketing of natural gas from the Appling Gas Field in Texas. Plaintiffs sought to recover as damages the loss of production from their wells in the field which had been occasioned by the entry of orders by the Texas Railroad Commission, setting production allowables for plaintiffs' wells at levels lower than plaintiffs thought they should have received. Plaintiffs sought to hold defendants liable for this loss on the ground that the Railroad Commission orders had been based, at least in part, on false forecasts and reports filed by defendants with the Commission. By amended complaint, plaintiffs specified various other activities by defendants, taken pursuant to the alleged conspiracy.

After reviewing the numerous depositions, documents and papers on file in the case, the Court held that although there were disputed issues of fact on whether defendants actually conspired together and whether they deliberately filed the false forecasts or brought about litigation as part of a conspiracy, plaintiffs would still not be entitled to recover antitrust damages for these activities even if proved. The Court held:

"The mere manipulation of labels does not determine the outcome of this case, for as made clear by other cases, liability is precluded if the restraint complained of results from otherwise valid governmental action even though brought about by the improper conduct of a private party." (*Id.* at p. 591.)

The Court observed that states have been free to regulate industries within their boundaries by curtailing competition or eliminating it altogether. *Asherville Tobacco Board of Trade, Inc. v. FTC*, 263 F. 2d 502 (4th Cir. 1959). The Court then compared the facts with those in *Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light*, 214 F. 2d 413 (5th Cir. 1954), and the Court agreed with the statement by Judge Biggs therein that:

"Implicit in [the Okefenokee] ruling is the legal conclusion that liability under the Sherman Act cannot be sustained by virtue of official action of a State agency, *however inspired by the acts of an individual.*" *Eastern Railroad President's Conf. v. Noerr Motor Freight, Inc.*, 273 F. 2d 218, 226 (3rd Cir. 1959) (dissenting opinion) (Emphasis Added.) Moreover, there are two crucial similarities between the two cases. In both, the injury complained of resulted directly from specific action taken by a state administrative agency on the basis of false information provided by private parties. Secondly, just as certainly as the plaintiff in *Okefenokee* had no legal right to use a particular route for the construction of a power line without the consent of the State of Florida, the plaintiffs here have no legal right to produce an amount of gas in excess of the specific allowable assigned to them by the State of Texas acting through the Railroad Commission. See Tex. Rev. Civ. Stat. Ann. art. 6008, Section 16 (1964)." (284 F. Supp. at p. 592.)

The same two crucial similarities are present in this case: the injury complained of by Appellant Sun Valley resulted directly from the action taken by the

Board of County Commissioners and Appellant Sun Valley has no legal right to engage in the garbage collection and disposal business in Clark County without an approved franchise.

In the *Woods* case, the Court concluded that the filing of false forecasts was a violation of state penal law and would support a cause of action under the state's statutory and common law. As suggested by Judge Thompson in the instant case, and as stated in the holding of the District Court in Texas:

"Simply by veiling their grievance under the penumbra of a conspiracy charge, however, plaintiffs cannot convert what are in essence only violations of state law and what is primarily a matter of state concern into a federal antitrust violation." (*Id.* at p. 594, citations omitted.)

3. The Seeking Of The Franchise Was Conduct Immune From Attack Under The Sherman Act.

The *Parker v. Brown* doctrine that governmental acts are immune from the antitrust laws was expressly reaffirmed in *Eastern Railroad President's Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). A group of trucking companies and their trade association brought suit against a group of railroads, a railroad association, and a public relations firm, alleging that the defendants had conspired to restrain trade in, and monopolize, long distance freight, in violation of Sections 1 and 2 of the Sherman Act (15 U.S.C. Sections 1, 2). More specifically, it was alleged that the railroads had hired the public relations firm, *inter alia*, to foster adoption and retention of laws and law enforcement practices destruc-

tive of the trucking business, and that the defendants had succeeded in persuading the Governor of Pennsylvania to veto a measure known as the "Fair Truck Bill". The District Court and the Court of Appeals allowed recovery and defendants petitioned for *certiorari*, limiting the question of the correctness of the judgment to violation of the Sherman Act.

In reversing the lower courts, Justice Black said:

"It has been recognized, at least since the landmark decision of this Court in *Standard Oil Co. of New Jersey v. United States*, that the Sherman Act forbids only those trade restraints and monopolizations that are created or attempted, by the acts of 'individuals or combinations of individuals or corporations'. Accordingly, it has been held that where a restraint upon trade or monopolization is the result of valid governmental action, as opposed to private action, no violation of the Act can be made out. These decisions rest upon the fact that under our kind of government the question whether a law of that kind should pass, or if passed be enforced, is the responsibility of the appropriate legislative or executive branch of government so long as the law itself does not violate some provision of the Constitution." (*Id.* at pp. 135-136.)

Recently, the immunity of governmental acts was applied to an exclusive franchise situation similar to that now before the Court in *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, et al.*, 362 F. 2d 52 (1st Cir. 1966). The Massachusetts Port Authority awarded a fixed base operation at the Logan International Airport to one aviation company to the exclusion of the plaintiff. A fixed base operation

is one that provides facilities, fuel, equipment, supplies, freight handling, and related services which are used by aircraft, crews, and passengers. (*Id.* at p. 53, n. 2.)

The plaintiff aviation company brought an action against the port authority, the aviation company receiving the award, and a subsidiary of the aviation company. The complaint alleged that the defendants entered into a "conspiracy, combination, or contract in restraint of trade or commerce" to establish a sole and exclusive fixed base operation at Logan Airport in violation of Section 1 of the Sherman Act and that each of them attempted to monopolize and combined and conspired to monopolize said business or operation in violation of Section 2 of the Sherman Act. (*Id.* at p. 53.) Plaintiff claimed injury in that it was forced to sell its business and equipment at Logan Airport at a very low price.

The District Court dismissed the suit on the ground that the complaint failed to state a claim upon which relief could be granted. The First Circuit Court of Appeals affirmed. Directing its attention to the conduct of the defendant aviation company and subsidiary, the Court concluded:

"If, as we have found, the Authority's conduct was lawful here it would be an unreasonable restriction on its freedom to hold that the other defendants acted illegally in having aided it." (*Id.* at p. 56, emphasis added.)

There was no intent at the time of enactment of the Sherman Act, nor is there any authority expressed by

the courts today to regulate governmental acts under the antitrust laws. The purpose of the antitrust laws is the protection of the public. This purpose is equally served by a government acting pursuant to valid legislative authority. And where a government does so act, it is an "unreasonable restriction on its freedom to hold . . . other(s) . . . acted illegally in having aided it."

It is clear from the foregoing authorities that the award of the franchise is immune from the antitrust laws. That the seeking of such a franchise or the combination with others for this purpose is not violative of the Sherman Act is also established law. As the Supreme Court pointed out in *Nocerr, supra*:

"We think it equally clear that the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular actions with respect to a law that would produce a restraint or monopoly." (365 U.S. at 136.)

To hold otherwise, the opinion points out "would impute to the Sherman Act a purpose to regulate, not business activity, but political activity." (*Id.* at p. 137.) Relying on *Parker v. Brown, supra*, the Court stated that there is no basis in the legislative history of the Act to impute such a purpose and such a construction would raise important constitutional questions:

"The right of petition is one of the freedoms protected by the Bill of Rights, and we cannot, of course, lightly impute to Congress an intent to

invade these freedoms.” (*Id.* at p. 138, emphasis added.)

Respondents in *Noerr, supra*, relied upon a finding of the District Court that the railroad’s sole purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business. The Supreme Court held that this purpose did not transform lawful acts into a violation of the Sherman Act:

“It is neither unusual or illegal for people to seek action on laws in the hope that they may bring about an advantage to themselves and a disadvantage to their competitors.” (*Id.* at p. 139.)

The Court further noted that it had expressly recognized this fact in *United States v. Rock-Royal Co-operative, Inc.*, 307 U.S. 533 (1939), where it stated:

“If ulterior motives of corporate aggrandizement stimulated their activities, these efforts were not thereby rendered unlawful. If the Act and Order are otherwise valid, the fact that their effect would be to give co-operatives a monopoly of the market would not violate the Sherman Act. . .” (*Id.* at p. 560.)

The extended scope of immunity from antitrust laws was affirmed by the United States Supreme Court in *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). In that case, the union sued partners of a coal mining company for royalty payments under an agreement. Defendants counterclaimed, alleging that the United Mine Workers (UMW) had violated the Sherman Act by conspiring with the large

coal producers to eliminate small producers. Evidence was introduced of a concerted effort by the UMW and the large producers to influence the Secretary of Labor to set a minimum wage in the industry so high as to drive out small producers. There was evidence that such a minimum wage had been set by the Secretary of Labor. Evidence was also introduced that defendants had successfully conspired to prevail on T.V.A. officials to purchase coal only from the large producers. After a verdict against the United Mine Workers, the UMW moved for a new trial on grounds that the above evidence had been improperly admitted. The Court of Appeals affirmed the trial Court's denial of the motion for a new trial, but the Supreme Court reversed and remanded. The Court said, at page 670:

"Noerr (Eastern Railroads President's Conf. v. Noerr Motor Freight, Inc., page 13, supra), shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose. . . . Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act. The jury should have been so instructed and, given the obvious telling nature of the evidence, we cannot hold this lapse to be mere harmless error." (Emphasis added.)

This line of cases quite clearly denies any violation of the antitrust laws resulting from "governmental action" whether state or local and "efforts to influence

public officials". (*Parker v. Brown and Noerr, supra.*) And no damages suffered thereby are recoverable under the Sherman Act. (*Pennington, supra.*)

Appellant Sun Valley does not dispute the authority of these cases or the conclusiveness of this defense. Appellant's careful avoidance of any discussion or citation of the immunity doctrine is not the result of inattention. It is remarkable that the Supreme Court's holdings argued by Appellees in the lower Court and adopted by Judge Thompson in his Opinion are not mentioned by Appellant Sun Valley for consideration by this Court.

This Court may affirm summary judgment without consideration of the other bases of the lower Court's decision. The doctrine of immunity and the constitutional reasons therefor merit the conclusion of this action without further delay and expense.

B. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT THERE WAS NO SHOWING THAT ANY LINE OF INTERSTATE COMMERCE ASSOCIATED WITH THE GARBAGE COLLECTION BUSINESS WAS SUBSTANTIALLY OR DIRECTLY AFFECTED BY ANY ACTS OR CONDUCT OF THE PARTIES. (Response to Appellant's Assignment of Error, Nos. 1-3.)

It is fundamental that in order to sustain a civil antitrust action under the Sherman Act, it must be established that the acts complained of involve interstate commerce or, if intrastate in nature, that they have a substantial and direct effect on interstate commerce. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *Las Vegas Merchant Plumbers Association v. United States*, 210

F. 2d 732 (9th Cir. 1954), *cert. denied*, 348 U.S. 817 (1955); *David Cabrera, Inc. v. Union de Choferes y Dueños de Camiones Hermandos de Puerto*, 256 F. Supp. 839 (D.P.R. 1966). Two separate tests of interstate commerce have emerged from the growing body of federal antitrust law on this subject. A clear statement of these tests, their conceptual differences, and the analytical approach to be followed in applying them is found in *Las Vegas Merchant Plumbers Association v. United States*, *supra*:

"A case under the antitrust laws, so far as the interstate commerce element is concerned may rest on one or both of two theories:

- (1) That the acts complained of, occurred within the flow of interstate commerce. This is generally referred to as the 'in commerce' theory.
- (2) That the acts complained of, occurred wholly on the state or local level, in intrastate commerce, but substantially *affected* interstate commerce.

Under both of these theories, the transactions complained of must *affect or have an effect* on interstate commerce or the requirements of the statute are not satisfied." (210 F. 2d at pp. 739-740, n. 3, emphasis by the Court.)

It will be noted that under either test, the essential element of first analysis is "the acts complained of". A close reading of the amended complaint and affidavits and a review of the facts established during discovery reveals nothing more than the *intrastate* competitive activities of several local garbage and refuse collectors, all of whom are located in, and conduct

business solely in, the geographical area surrounding Las Vegas, Nevada. Nevertheless, Appellant Sun Valley has, through a sophistry of words and legal conceptualizations, attempted to dress up these essentially intrastate activities in interstate garb to meet the jurisdictional requirements of the Sherman Act. This attempt fails for the reasons set forth below:

1. The Acts Complained Of Did Not Occur In Interstate Commerce.

The guidelines for the "in commerce" test of jurisdiction were further delineated in *Page v. Work*, 290 F. 2d 323 (9th Cir. 1961), *cert. denied*, 368 U.S. 875 (1962). The case came before the Court on appeal from the District Court's dismissal of the action by granting defendants' motion for summary judgment for lack of jurisdiction. Appellant's main contention was that the trial Court committed error in finding that the product involved was not in the flow of interstate commerce. It was their position that the business of printing and publishing newspapers is interstate because newsprint, ink, other supplies, news items, and advertisements are received from outside California. The Ninth Circuit Court of Appeals agreed that plaintiff and defendants were engaged in interstate commerce by virtue of:

- (1) Their regular purchases of newsprint and other supplies from sources outside of California;
- (2) The dissemination of national news;
- (3) Their carrying of national advertising;
- (4) A few out-of-state subscribers.

However, this was not determinative of the issue of interstate commerce:

"The test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business." (290 F. 2d at 330.)

The commerce issue in *Page v. Work* was identical to that in the case at bar. Appellees, various newspapers in the City and County of Los Angeles, caused the formation of the Los Angeles Newspaper Service Bureau ("Bureau"), a California corporation. Each of the defendant newspapers individually used the services of the Bureau for the solicitation of private and public legal advertising. The Bureau assisted newspapers in soliciting lawyers, title companies, escrow departments, court commissioners, and others who published legal notices in the local newspapers. As a result of such joint operation, and other activities of the Bureau, it was charged that the business of the Los Angeles Journal became so impaired that it was sold at a distressed price and the assets were purchased by a subsidiary corporation of the Bureau.

An action was brought by a stockholder of the Los Angeles Journal under Sections 1 and 2 of the Sherman Act. (15 U.S.C., Sections 1, 2.) After extensive pretrial discovery, a motion for summary judgment was granted on the jurisdiction issue because no effect was shown on any part of the trade or commerce among the several states.

In setting forth the method by which it arrived at its conclusion, the Court stated:

“Appellant’s view of the flow of commerce relates to the newspaper business as a whole rather than the *relevant market* with which we are concerned, which is separate and divisible from other markets in which a newspaper may be engaged. In the antitrust field, a *relevant market* may be narrower than the entire business under scrutiny.” (*Ibid.*, emphasis added.)

The Court then held that the product involved was legal advertising in newspapers printed, published, and circulated in Los Angeles County; the relevant geographical market in which the parties competed was Los Angeles County.

In applying the test of *Page v. Work* to the facts now before the Court, it is apparent that the same result should be reached. Here, as in *Page v. Work*, the product involved was a service, to wit, the service of garbage collection and disposal. This was the only service which Appellant Sun Valley provided and the sole business for which it was licensed to operate. This was the only service provided by Appellee Clark Sanitation in competition with Appellant Sun Valley. Garbage collection and disposal service was, therefore, the sole product in which there was any competition with Appellant Sun Valley, and from which any restraint on commerce could arise.

The relevant geographic market in which the parties provided the service of collecting and disposing of garbage was Clark County. Appellant Sun Valley operated its garbage collection and disposal service

only in Clark County. Appellee Clark Sanitation operated its garbage collection and disposal service only in Clark County. Finally, garbage collection and disposal is limited by the relevant Nevada statute (N.R.S. 244.183, p. 27, *supra*) to the geographical area over which the governmental authority granting the franchise has jurisdiction. That area was the unincorporated area of Clark County.

From the above it is clear that, as with the publication of legal notices in Los Angeles County in *Page v. Work*, *supra*, the line of commerce in the case at bar upon which any restraint is or could be alleged is *intrastate*, i.e., garbage collection and disposal services in the unincorporated area of Clark County.

2. The Acts Complained Of Have Not Affected Nor Had An Effect On Interstate Commerce.

(a) The Container Theory.

Appellant Sun Valley infers that Appellees affect interstate commerce because the corporations have purchased some equipment that is manufactured out of state. It is submitted that this theory reduces the concept of interstate commerce to an absurdity. Nevada is not a heavily industrialized state. It is therefore understandable that most businesses depend to some extent upon imported manufactured goods. Does it then follow that all of these businesses suddenly affect commerce between the several states within the meaning of the Sherman Act?

Appellant Sun Valley goes to great lengths in the amended complaint and affidavits to describe the amounts of equipment which have been supplied to the

parties from out-of-state sources. The description includes the dollar volume of items purchased and the amount of income derived by the parties from these products. For the purposes of this Brief, Appellees do not dispute these figures, but ask only for any indication that the trade or commerce in these goods has been affected. Appellant Sun Valley does not allege that it was restrained in its efforts to obtain containers, that the Appellees were able to effect the prices charged for these containers, or that there was a division of market for containers. Similarly, there are no factual allegations as to any competition between the parties or any effect on commerce from other materials used in the performance of garbage collection and disposal services such as garbage trucks, tires, replacement parts, and office supplies.

Futile attempts to satisfy the interstate commerce requirement by oblique references to products made out-of-state are recorded in numerous decisions. The decision in *Lieberthal v. North Country Lanes, Inc.*, 332 F. 2d 269 (2d Cir. 1964), is squarely on point and illustrates a common sense application of the tests of interstate commerce in an antitrust action. The plaintiff alleged, *inter alia*, that defendants conspired to prevent him from opening up a bowling alley in competition with one of the defendants' bowling alleys. The complaint touched numerous bases in the field of interstate commerce including the following:

- (1) Competition with out-of-state bowling alleys;

- (2) The solicitation of out-of-state patronage by news and other media;
- (3) A substantial flow of kitchen, service, and bowling equipment and merchandise to be sold at the bowling alley.

The District Judge dismissed the complaint because the averments were insufficient to show any restraint of *interstate* as opposed to *intrastate* commerce. The Court of Appeals agreed:

"A business of which the ultimate object is the operation of intrastate activities . . . may make such a substantial utilization of the channels of interstate trade and commerce that the business itself assumes an interstate character. . . . *It has frequently been held, however, that the incidental flow of supplies in interstate commerce, . . . the interstate travel of customers of the local enterprise, . . . the solicitation of business in other states for the local enterprise, . . . the utilization of interstate communications media, . . . or a location in an area of interstate activity, . . . do not in themselves suffice to transform an essentially intrastate activity into an interstate enterprise.*" (*Id.* at p. 271, citations omitted, emphasis added.)

The Court then noted the general rules that the Sherman Act condemns wholly local business restraints that affect interstate commerce as well as restraints in interstate commerce, but observed that:

" . . . the effect of the local restraints on interstate commerce must be 'direct and substantial,

and not merely inconsequential, remote or fortuitous'." (*Id.* at 272, emphasis added.)

A common sense application of this test led the Court to conclude that the restraints alleged—the stoppage of the flow of bowling alley equipment and materials from outside the state—constituted a far cry from the required substantial effect on interstate commerce.

Variations on the *Lieberthal* theme are in abundance. In *Monument Bowl, Inc., v. Northern California Bowling Proprietor Association*, 197 F. Supp. 208 (1961), *rev'd on other grounds*, 316 F. 2d 787 (1963), the plaintiff operated a bowling alley in South San Francisco. Defendants were other bowling alleys, their proprietors, and five trade associations. Plaintiff alleged defendants violated the Sherman Act by establishing minimum prices and by boycotting his business (since his patrons were ineligible to compete in tournaments conducted by members of defendant associations). Intrastate commerce was said to be affected by the flow of bowling equipment, bags, shoes, etc., and the existence of an interstate network of tournaments. The District Judge granted a motion to dismiss the complaint on the basis that the acts complained of were purely *intrastate* and had no appreciable effect on interstate commerce:

"Yet it is the consumer, the bowler and his patronage, with whom we are concerned and whose patronage gives rise to the *relevant market*. A charge dealing with loss of customers, in the manner set forth above, does not pertain to a

violation of Section 1 of the Sherman Act. Rather, at most, it deals with local restraint which affects local commerce.

"It is not enough to allege that plaintiff's order for equipment will decline by reason of defendants' competition which takes away a percentage of bowling customers. Such allegation is too remote from the flow of interstate commerce to bring into application plaintiff's authorities." (197 F. Supp. at 210, emphasis added.)

In *Spears Free Clinic and Hospital v. Cleere*, 197 F. 2d 125 (10th Cir. 1952), plaintiffs alleged a conspiracy on behalf of numerous defendants to restrain them from obtaining a license and practicing chiropractics in the State of Colorado. The Court of Appeals affirmed the lower court's decision in dismissing the complaint on the ground that the effect upon interstate and foreign commerce was "fortuitous and remote and not direct and substantial". The Court stated:

"A curtailment of the manufacture of articles to be shipped in interstate commerce or the lessening of the number of persons who travel in interstate commerce resulting from a conspiracy to restrain or monopolize a wholly local activity *is ordinarily* an incidental, indirect and remote obstruction to *such commerce*." (*Id.* at 127, emphasis added.)

"Here the purpose and object of the conspiracy and the means adopted to effectuate it were to restrain the practice of chiropractic and to allocate to the medical profession the practice of the healing arts in Colorado. *It is this exclusively local*

aim and not the fortuitous and incidental effect upon interstate and foreign commerce which gives character to the conspiracy. The effect upon interstate and foreign commerce was fortuitous and remote and not direct and substantial.” (*Id.* at 128, emphasis added.)

Finally, the receipt of materials and equipment from out-of-state suppliers was also rejected as fulfilling the commerce requirement in *Marks Food Corporation v. Barbara Ann Baking Co.*, 162 F. Supp. 300 (S.D. Calif. 1958), *rev'd on other grounds*, 274 F. 2d 934 (9th Cir. 1960). Plaintiffs established that defendants purchased (outside the state) a substantial portion of the flour and machinery used in the making of bread and that these materials were shipped into California across state lines by the defendants. (162 F. Supp. at 302.) But the Court held that defendant's business was neither in nor directly affected trade and commerce among the several states. As the Court remarked:

“If plaintiff's theory in the case at bar were adopted, then any group . . . who purchased raw materials and machinery outside the state . . . could be amenable to the antitrust laws.” (*Id.* at 304.)

Appellant's container theory is apparently predicated on the fact that fewer of these items will move in interstate commerce because of Appellees' alleged restraint on the purely intrastate garbage collection and disposal service. The rationale found in the *Lieberthal*, *Spears Free Clinic*, *Monument Bowl*, and

Mark's Food cases, cited above, clearly demonstrates the infirmity of this theory as a basis for transmuting an essentially intrastate business into an interstate enterprise. Appellees respectfully contend that a common sense application of the principles enunciated in those cases to the facts in the case at bar, leads to the inescapable conclusion that any effect on interstate commerce arising out of the sporadic movement of such items into Nevada is clearly incidental, remote, fortuitous, speculative, and inconsequential.

(b) The Page, Arizona, Theory.

Appellant's final attempt to meet the jurisdictional requirements of the federal antitrust laws is predicated on the fact that Appellee Henderson Disposal Service, Inc. (Henderson Disposal) operated a garbage collection and disposal service in Page, Arizona, prior to 1964. The sole purpose in joining Henderson Disposal in this action was to remedy the jurisdictional defects. But as previously noted, Henderson Disposal is an independent company engaged in its own garbage collection and disposal service. It does not share common yard or office facilities, pickup territories, dump sites, or equipment rental arrangements with any of the other Appellees. And, it has never been in competition with Appellant Sun Valley in Clark County.

The same jurisdictional ploy was attempted by an unsuccessful plaintiff in *C. A. Page Publishing Co. v. Work*, 290 F. 2d 334 (9th Cir. 1961)—a companion case to *Page v. Work*, *supra*. In order to meet the interstate commerce requirement, the plaintiff-appel-

lant claimed that the same conspiracy alleged in *Page v. Work*, *supra*, included a restraint on the dissemination of national news through the City News Service, a news gathering agency at one time operated by one of the defendants. The Court summarily rejected this attempt to establish jurisdiction:

“We see no relation between the operation of City News Service and the competition between appellees and Commercial News (appellants) for public legal advertising, and thus the interstate character of City News Service is *entirely irrelevant to jurisdictional issues here presented.*” (*C.A. Page Publishing Co. v. Work*, 290 F. 2d 334, 337 (1961), *emphasis added.*)

Similarly, there is no relation between the operation of garbage collection and disposal service in Page, Arizona, and the competition between Appellant Sun Valley and Appellee Clark Sanitation in Clark County. And thus any interstate character of business of Henderson Disposal is entirely irrelevant to the jurisdictional issues in this case.

There is additionally no factual allegation of any effect upon the commerce in Page, Arizona. Nothing has been raised by the exhaustive discovery to indicate any restraint on this service. Jurisdiction under the federal antitrust laws is not established because of a failure to show specific facts indicating a relationship between the acts complained of and a line of interstate commerce involved in this lawsuit.

C. THE DISTRICT COURT DID NOT ERR IN HOLDING THAT IF THE FRANCHISE AWARD WAS ILLEGAL, THE REMEDY IS TO ATTACK THE FRANCHISE. (Response to Appellant's Assignment of Error, Nos. 6 and 7.)

The District Court has held that if the franchise award which is the basis of this action was illegal, the remedy is to attack the franchise. (R. 1098.) This decision should not have surprised Appellant Sun Valley. In 1963, it obtained an order preventing Clark Sanitation from operating the franchise because publication of notice to bid had been faulty. (R. 1121-250.) In 1965, it threatened a similar attack on the franchise now involved. In March, 1968, it brought such attack in the District Court of the State of Nevada. (Appendix B.) Had not Appellant been so wistfully pursuing what Judge Thompson termed the "Golden Fleece" of treble damages, the jurisdiction of a state court might have been earlier sought.

For whatever reasons Appellant did not directly challenge the franchise award before, it cannot indirectly do so now under the guise of an alleged anti-trust violation. The impropriety of collaterally attacking the actions of County Commissioners in a federal antitrust suit was affirmed in *Okefenokee Rural Electric Membership Corporation v. Florida Power & Light, et al.*, 214 F. 2d 413 (5th Cir. 1954). The Circuit Court of Appeals upheld the dismissal of the complaint because:

"The injury complained of by Okefenokee being the refusal of the State Road Department to grant it a permit to run its line down a state

highway, and the adoption by the Duval County Commissioners of regulations invading its legal rights, the actions of those administrative bodies could not afford Okefenokee any right of action under the Antitrust Acts, since the orders complained of were the sole responsibility of the administrative boards, and the subject matter was exclusively within their jurisdiction; the validity of those orders could be attacked only in an action of mandamus or other such remedy in the state court and may not be collaterally attacked in this proceeding." (*Id.* at 417, n. 4.)

In *TV Pix, Inc. v. Allard, et al.*, and *Wells TV, Inc. v. Allard, et al.* (Memorandum Opinion of the United States District Court for the District of Nevada filed December 16, 1966), complaints were filed in the federal district court seeking preliminary and final injunctions prohibiting defendant members of the Public Service Commission of the State of Nevada from investigating, taking jurisdiction, or imposing any regulation pursuant to N.R.S., 704, *et seq.* After discussing two lines of Supreme Court authority for denying jurisdiction, the three-judge Court held:

"There is an adequate procedure in the state courts to have these questions decided. If the defendants determine that the plaintiffs are within the purview of NRS 704.020 (d) they will then issue an order requiring the plaintiffs to cease and desist operations until a certificate of public convenience and necessity is issued. NRS 704.330 (4). The plaintiffs may then bring an action in the state district court to have the order of the

Commission vacated or set aside. NRS 704.540. An appeal is available from a decision in the state district court to the Supreme Court of the State of Nevada, NRS 704.580. Since it is possible that the interpretation given by the state courts may be dispositive of the case, this Court will abstain from exercising jurisdiction.

"The federal courts will also adopt a hands-off policy when the problem involves the administration by the state of its own affairs. Where state administrative action is challenged, the federal court will normally not intervene when there is an adequate state review procedure for the protection of federal rights. *Burford v. Sun Oil Co.*, 319 U.S. 315; *Alabama Public Service Comm. v. Southern Railway Co.*, 341 U.S. 341. The Courts will not meddle in a state's administrative affairs. See also: *Audio-casting, Inc. v. State of Louisiana*, 143 F. Supp. 922." (Memorandum Opinion at p. 6.)

The three-judge Court found particularly persuasive the language of Justice Jackson in *Public Service Commission of Utah v. Wycoff Company, Inc.*, 344 U.S. 237 (1952). In ordering the dismissal of a suit seeking declaratory judgment and an injunction restraining the state public service commission, the Supreme Court said:

"State administrative bodies have the initial right to reduce the general policies of state regulatory statutes into concrete orders and the primary right to take evidence and make findings of fact. It is the state courts which have the first and last word as to the meaning of state statutes and whether a particular order is within the legisla-

tive terms of reference so as to make it the action of the State. We have disapproved anticipatory declarations as to state regulatory statutes, even where the case originated in and was entertained by courts of the State affected. *Alabama State Federation of Labor v. McAdory*, 325 U.S. 450. Anticipatory judgment by a federal court to frustrate action by a state agency is even less tolerable to our federalism. Is the declaration contemplated here to be *res judicata*, so that the Commission cannot hear evidence and decide any matter for itself? If so, the federal court has virtually lifted the case out of the State Commission before it could be heard. If not, the federal judgment serves no useful purpose as a final determination of rights." (344 U.S. at 246-7, emphasis added.) Cf. *Burford v. Sun Oil Co.*, 319 U.S. 315 (1942); *Tomiyasu v. Golden*, 358 F. 2d 651 (9th Cir. 1966).

In order for Appellant Sun Valley's collateral attack on the franchise to affect the defense of the immunity of governmental acts and the immunity of joint effort to obtain such acts, the jury would have to be instructed that it could find the award of the franchise void under Nevada law. The idea of a federal jury deciding the propriety of county franchises in a suit brought under Section 4 of the Sherman Act is as novel as it is unsound. The District Court did not abuse its discretion in requiring Appellant to seek a state remedy. The District Court did not abuse its discretion in granting summary judgment.

Summary judgment has been one of the keystones of modern federal practice. Where, as here, there is

no genuine issue of material fact, this procedural tool is necessary to avoid a prolonged and expensive trial. The validity of summary judgment was most recently attested in *First National Bank of Arizona v. Cities Service Co.*, 88 S.Ct. 1575 (1968). This was a treble damage antitrust action brought against seven large oil companies alleging the formation and maintenance of a world-wide oil cartel and a conspiracy claimed to have been entered into at the time of the nationalization of the properties of the Anglo-Iranian Oil Company by the government of Iran in May, 1951. In affirming summary judgment for Defendant Cities Service Co., the Supreme Court said:

"While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an anti-trust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." (*Id.* at p. 1593.)

The Court emphasized that where extensive pre-trial discovery has failed to produce probative evidence to support the allegations of the pleadings, the increased efficiency of summary judgment procedures under the amended Rule 56 of the Federal Rules of Civil Procedure should be invoked.

VII

CONCLUSION

There is no genuine issue of fact for trial and judgment is properly entered. Appellees respectfully submit that this Court should affirm the judgment of the District Court.

Dated, San Francisco, California,
September 16, 1968.

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(Appendices A, B and C Follow)



Appendix A

In the United States District Court
for the District of Nevada.

Civil No. 847

Sun Valley Disposal Co., Inc., a corporation,

Plaintiff,

vs.

Silver State Disposal Company, a corporation, et al.,

Defendants.

MEMORANDUM OPINION

Defendants have moved for summary judgment in this antitrust action involving the garbage collection franchise for Clark County, Nevada. Pretrial discovery has been extensive and in the context of such thorough preparation, the use of the word "summary" to characterize the motion made is far from apt. All the plaintiff's cards—or at least its aces and kings—are on the table, and the issue presented is whether the proofs adduced, taking them in the light most favorable to plaintiff, support the structure of a cause of action under the Sherman Act sufficient to require submission of the case to a jury for determination.

Plaintiff's proliferation of ideas, contentions, inferences, citations of authority, quotations from cases

and arguments engenders admiration for the industry, imagination and ingenuity of counsel, but it has made it impossible for the Court to separately consider and comment in writing upon each argument made and court decision cited. This surely is not the situation, which so frequently occurs, of casual preparation in the trial court followed by thorough research and scholarly briefs on appeal. If this Court reaches the wrong conclusion, it will not be because it has not been fully informed by counsel.

The "Golden Fleece" of treble damages plus attorneys' fees and costs has led the diligent, aggressive lawyer to adapt the language of monopoly and restraint of trade to all varieties of normal, standard and customary business transactions. While such expertise in legal composition may withstand a motion to dismiss, it does not require or justify judicial submission to the descriptive language of the pleadings when the facts are laid bare. Cf. *Harman v. Valley National Bank of Arizona*, 9th Cir. 1964, 339 F. 2d 564; *SS Logging Co. v. Barker*, 9th Cir. 1966, 366 F. 2d 617. "The use of conventional anti-trust language in drafting a complaint (or, we may add, in arguing a case) will not extend the reach of the Sherman Act to wrongs not germane to that act, even though such wrongs be actionable under state law." *Parmelee Transportation Company v. Keeshin*, 7th Cir. 1961, 292 F. 2d 794.

It must be conceded at the outset that the proofs will support a finding that the defendants—interrelated corporations—their officers and stockholders,

acted in concert among themselves and with others named in the Amended Complaint to bring about a favorable result for the financial profit of defendants, or some of them. In other words, there was a conspiracy or combination, without ascribing to those words the disparaging connotations frequently present. We cannot, however, infer from the facts an unlawful conspiracy—one which is abjured by the Sherman Act as being unlawfully in restraint of trade or toward the attainment of an illegal monopoly.

The object of the conspiracy was to obtain for defendant Clark Sanitation, Inc., an exclusive franchise for the garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada. Before the grant of the exclusive franchise, plaintiff, Sun Valley Disposal Co., Inc., was in open competition with Clark Sanitation, Inc. in the collection of garbage in the unincorporated area. The first step in the campaign was to persuade the Nevada Legislature to enact a statute authorizing Counties to award exclusive franchises for garbage collection and disposal service. Statutes of Nevada, 1960, Chapter 246, p. 433; N.R.S. 244.187. Such legislation is not claimed to be illegal, and the political activity or lobbying which accomplished its passage is protected activity under the antitrust laws. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 1961, 365 U.S. 127. Then defendants worked with or influenced the Clark County Commissioners to implement the statutory authority and to fix terms or conditions of the franchise award which would favor Clark Sanitation,

Inc. The first award of an exclusive franchise to Clark Sanitation, Inc. was set aside by the state court because the publication of the notice to bid was faulty. The second effort to obtain proposals for performance of the County garbage disposal needs resulted in the award of the exclusive franchise to Clark Sanitation, Inc., under which it is presently operating. The validity of this franchise has not been attacked in any action, and it is this exclusive franchise which resulted in the extinction of plaintiff's garbage disposal business in Clark County and eliminated competition in performance of such services.

Plaintiff's incidental claims which find inferential support in the evidence are that the competition between Sun Valley and Clark Sanitation for county garbage disposal customers before the award of the franchise impaired plaintiff's financial position and its ability to earn a profit; that the other defendants assisted Clark Sanitation in this competition in various ways; that one or more of the County Commissioners favored Clark Sanitation for personal selfish reasons unrelated to the public interest; that misrepresentations were made in Clark Sanitation's proposal for the exclusive franchise; and that the procedures adopted for award of the franchise were illegal. The argument, as we understand it, viewing the evidence in the light most favorable to plaintiff, is that the damage was done before the exclusive franchise was awarded and that defendants' concerted activity had placed plaintiff in a position so that plaintiff could not successfully bid for the exclusive franchise against Clark Sanitation.

▼

It, nevertheless, must be recognized that had no exclusive franchise been awarded, plaintiff would still be in open competition with defendants. The argument that the award of the franchise to Clark Sanitation may be viewed as not the essence of the monopolistic conspiracy but as merely an incidental proximate result flowing from the conspiratorial activity, while an interesting exercise in mental gymnastics, does not appeal to common sense. The gravamen of plaintiff's carefully structured case is that the effect of the conspiratorial activity was to place plaintiff in a position so that it could not bid successfully for the franchise, and the ultimate award of the franchise to Clark Sanitation is the very essence of the conspiracy without which monopolistic control of the garbage disposal business in the unincorporated area of Clark County would not have been obtained.

Naming one or more of the Clark County Commissioners as co-conspirators does not, in our opinion, save plaintiff's case. Local governmental units such as city councils and county boards are not and never will be free from personal interest and outside influence. Negotiations with such boards or members thereof regarding ordinances, resolutions, contracts, licenses, permits and the like, we deem to be within the protected or excluded area of activity insofar as the anti-trust laws are concerned. Here the state created the machinery for the grant of a monopolistic franchise. *Parker v. Brown*, 1943, 317 U.S. 338. No violation of the Sherman Act can be predicated upon mere attempts to influence the passage or enforcement of laws

or an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. *Eastern R. Conf. v. Noerr Motors*, 1961, 365 U.S. 127. The point is not that the County Commissioners, acting in an official capacity, may enjoy a personal governmental immunity from liability for any such conspiratorial activity. Rather, it should be emphasized that activity to influence legislative or executive conduct is not the kind of activity which will support a Sherman Act suit. That is not to say that in a different case, evidence of such activity would not be probative on the issues of existence of a conspiracy, intent, motive and the like, but where, as here, the very foundation of the claim is that plaintiff was placed in a position so that it could not successfully compete for the franchise the cause must fail. Cf. *Wiggins Airways, Inc. v. Massachusetts Port Authority*, 1st Cir. 1966, 362 F. 2d 52; *United Mine Workers of America v. Pennington*, 1965, 381 U.S. 657.

We do not understand *Harman v. Valley National Bank*, 9th Cir. 1964, 339 F. 2d 564, and *SS Logging Co. v. Barker*, 9th Cir. 1966, 366 F. 2d 617, upon which plaintiff places strong reliance, to be inconsistent with these conclusions. In the *Harman* case, the Court said:

“We agree with appellees that Noerr would apply whether or not the proceeding brought by the Attorney General had substantive merit and complied with statutory procedural prerequisites. In either event, appellees’ conduct in informing the Attorney General of alleged ‘irregularities’

and persuading him to take the action which they desired with respect to enforcement of the Arizona statute would be essentially political in nature, and basically dissimilar from the 'price fixing agreements, boycotts, market-division agreements, and other similar arrangements' normally held violative of the Act. 365 U.S. at 136, 81 S. Ct. at 529. Moreover, to make Sherman Act liability depend upon ultimate resolution of often difficult questions of law and fact relating to the validity or propriety of solicited governmental action 'would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade' (365 U.S. at 137, 81 S. Ct. at 529), and 'would raise important constitutional questions' because of the inevitable burden which such a construction of the Sherman Act would impose upon the right of the people to petition the government for the redress of grievances. 365 U.S. at 138, 81 S. Ct. at 530."

The Court then went on to emphasize that in the Complaint, a larger conspiracy not limited to the alleged improper influencing of governmental action against one financial institution had been charged. In the Barker case, the Court relied upon the principle of governmental immunity to sustain the dismissal of the anti-trust action as against the government officers who were charged as co-conspirators, and said:

"The allegations of the complaint using the words 'conspired with each other and with the defendants' and 'conspired to and arranged for

another sale' and a 'conspiracy to injure the plaintiff' do not operate to take this case out of the Gregoire rule."

Judge Merrill dissented from this holding, although concurring in the result. In that case, the rights of the non-official defendants were not before the Court and there was no occasion to consider the impact of the principle of the *Noerr* case upon the transactions alleged.

We cannot disregard the fact that whenever two or more persons, perhaps one of them a public official, confer, negotiate, discuss or transact business for the attainment of a common objective, there is a basis for a charge of conspiracy, confederation or combination. While the principle of official immunity insulates the public officer from personal liability to an injured person for official misconduct, there is no such principle protecting the private citizen who must answer for his conspiratorial wrongdoing. Still a related principle in anti-trust law stemming from a similar root, that is, recognition of the overweening need to permit our democratic institutions to work free from the harassment and impediment of litigious warfare, announces that efforts to persuade the legislative or executive authority to take particular action relevant to a monopolistic objective are not actionable under the Sherman Act. It is submitted that the two principles are related and that the combination of them precludes recognition of an actionable conspiracy which is predicated for its accomplishment upon influence, rightful or wrong-

ful in character, to instigate governmental action and irrespective of whether or not the official is named as a co-conspirator.

A case of this kind should not be viewed in the light of the slogan "every wrong must have a remedy." The problem is not whether plaintiff has a remedy—it is whether defendants' alleged conspiratorial conduct is actionable under the Sherman Act. If the exclusive franchise was lawfully granted to Clark Sanitation, it has a legal monopoly authorized by the State of Nevada under its police power to protect public health and welfare. The Sherman Act does not proscribe concerted activity with the purpose to obtain such a franchise. If the franchise was unlawfully granted, the remedy is to attack the franchise.

Defendants' primary argument in support of a summary judgment is that the proofs do not show that the acts complained of involve interstate commerce or have a substantial and direct effect upon interstate commerce. We think this, too, is well taken. The dispute in this case is limited to the garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada. Nothing could be much more local in character. While interstate commerce, in the acquisition of equipment and supplies for the garbage collector, is incidentally involved, the acts or conduct complained of did not affect the interstate commerce of the garbage collection business. *Page v. Work*, 9th Cir. 1961, 290 F. 2d 323. There is no showing that any line of interstate commerce asso-

ciated with the garbage collection business was substantially or directly affected by any acts or conduct pursuant to the conspiracy to monopolize. Until the exclusive garbage collection franchise was granted, both the competitive businesses, Sun Valley Disposal Co. and Clark Sanitation, Inc., operated unhampered and unimpeded insofar as lines of interstate commerce were concerned.

For the reasons stated, a summary judgment will be entered for defendants. The Answer of defendants includes eight counterclaims. No basis for federal jurisdiction of the counterclaims is alleged, and they must fall with the determination that the Court has no jurisdiction of the principal action.

Dated: February 26, 1968.

Bruce R. Thompson
United States District Judge
Filed February 27, 1968,
Bernard Supera, Clerk.

Appendix B

Case No. A52256

In The Eighth Judicial District Court of the State
of Nevada in and for the County of Clark

Sun Valley Disposal Co., Inc., a Nevada
corporation, Plaintiff,

vs.

Clark Sanitation, Inc., a Nevada corpora-
tion, and Louis F. La Porta, Robert T.
Baskin, William H. Briare, Darwin W.
Lamb, and James G. Ryan, as the Board
of County Commissioners of Clark
County, Nevada, Defendants.

COMPLAINT

1. At all times herein material, Sun Valley Disposal Co., Inc., hereinafter called Sun Valley, was a corporation operating under and by virtue of the laws of the State of Nevada. Effective between approximately January 1, 1961 and April 4, 1965, Sun Valley has conducted a garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada. At the present time, Sun Valley's garbage pick-up and disposal service is shut down. Its customers in Clark County have been taken from it by the defendant, Clark Sanitation, Inc., as a result of the commission of unlawful acts, as hereinafter alleged. At all times herein material, R. J. Collet

has owned certain equipment used by Sun Valley exclusively in its garbage pick-up and disposal service. R. J. Collet has duly executed the assignment, copy of which is hereto annexed as Exhibit "A" and incorporated herein by reference.

2. At all times herein material, Clark Sanitation, Inc., hereinafter called Clark Sanitation, was a corporation organized and operating under and by virtue of the laws of the State of Nevada, with its principal place of business in Clark County, Nevada. At all times herein material, Clark Sanitation has conducted a garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada.

3. At all times herein material, Defendants Louis F. La Porta, Robert T. Baskin, William H. Briare, Darwin W. Lamb and James G. Ryan were, and are now, the Board of County Commissioners of the County of Clark, State of Nevada, a political subdivision of the State of Nevada.

4. At all times herein material, Sun Valley had a legal right to exercise the privilege of garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada, in open competition with Clark Sanitation.

5. At all times herein material, Sun Valley had a substantial investment in its aforesaid business, and had paid Clark County, Nevada, business license fees for the right to operate its aforesaid business, as well as substantial personal property taxes upon the equipment used by Sun Valley in said business, which license fees and taxes the Board of County

Commissioners of Clark County, Nevada, at all times received and accepted.

6. On March 5, 1965, Defendants Louis F. La Porta, Robert T. Baskin, William H. Briare, Darwin W. Lamb and James G. Ryan, as the Board of County Commissioners of Clark County, Nevada, awarded to Clark Sanitation a void exclusive franchise for the garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada.

7. The purported exclusive franchise awarded to Clark Sanitation was void for the following reasons:

(a) Defendant Board of County Commissioners adopted procedures for the award of the franchise which failed to comply with the governing statute (NRS 244.187);

(b) The rates to be charged the public were eliminated as a bid variable in advance of the publication of an invitation for bids;

(c) The published bid documents failed to show a common prescribed standard to be used in arriving at the best bid;

(d) The published bid documents contained a multiplicity of bid variables;

(e) The published bid documents instructed prospective bidders to fill in three (3) bid variables on the garbage dump use permit and three (3) bid variables on the franchise for garbage pick-up and added to the instructions: "The Board of Commissioners further reserves the right to consider the bids for the Franchise and the Use Permit either separately or

together when making its determination as to the granting of the Franchise and the Use Permit”;

(f) Defendant Board of County Commissioners voted a package deal for both dumpsite and garbage pick-up and disposal under circumstances whereby the bid conditions applicable to the dump use permit prohibited dump charges to be imposed upon the City of Las Vegas franchise holder and about seventy-five (75%) per cent to eighty-five (85%) per cent of the dump business came from the City of Las Vegas franchise holder which was interrelated through officers, directors and stockholders with Clark Sanitation;

(g) One or more of the County Commissioners of Clark County, Nevada, favored Clark Sanitation for personal selfish reasons unrelated to the public interest;

(h) Misrepresentations were made in Clark Sanitation's proposal for the exclusive franchise, to-wit: In response to request that the bidder submit an inventory of “Presently owned or leased equipment,” Clark Sanitation listed “Inventory of Rolling Stock Owned, Operated and/or Leased by Clark Sanitation, Inc., February 1965” as \$327,010.96, well knowing that the inventoried equipment was pooled among Clark Sanitation and other interrelated corporations conducting garbage pick-up and disposal service outside of the unincorporated area of Clark County, Nevada; that from time to time it was necessary to use a piece of equipment owned by an interrelated corporation for a portion of time in an area that was not serviced by the corporation which owned

the equipment; that intercompany use resulted in Clark Sanitation using another corporation's equipment 8½ percent of the time; that only particular trucks were assigned to Clark Sanitation's routes; that only 25 percent of the capacity of the trucks listed were used by Clark Sanitation in the unincorporated area of Clark County, Nevada;

(i) Defendant Board of County Commissioners, by its aforesaid procedures denied Sun Valley due process of law, in violation of Sun Valley's rights under the Constitution of Nevada and the due process of law clause of the Fourteenth Amendment to the United States Constitution.

8. Clark Sanitation has, subsequent to the aforesaid award of the void exclusive franchise, used the void exclusive franchise fraudulently obtained, as hereinbefore alleged for the purpose of excluding competition by Sun Valley in garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada.

9. As a proximate result of the acts committed, as hereinbefore alleged, Sun Valley has suffered destruction of its good will in the value of \$457,950.00 and R. J. Collet has suffered damage in the loss of value of trucks, equipment and containers in the amount of \$38,183.49.

10. On or about April 4, 1963, a final judgment was duly entered by the Eighth Judicial District Court of the State of Nevada, in and for the County of Clark, in Case No. 111634, entitled Sun Valley Disposal Co., Inc., a Nevada corporation, Plaintiff,

vs. Harley Harmon, Robert Baskin, Arthur Olson, Norman White and Louis La Porta, as the Board of County Commissioners of Clark County, Nevada, and Clark Sanitation, Inc., a Nevada corporation. Plaintiff intends to rely upon the findings of fact in said prior proceeding essential to said judgment as conclusive between the parties to this action

Wherefore, Plaintiff, Sun Valley Disposal Co., Inc., a corporation, prays for judgment as follows:

1. Declaring null and void the purported award by the Defendant Board of County Commissioners of Clark County, Nevada, of an exclusive franchise for garbage pick-up and disposal service in the unincorporated area of Clark County, Nevada;

2. Awarding in favor of Sun Valley Disposal Co., Inc., a corporation, and against Defendant Clark Sanitation, Inc., the sum of \$496,133.49 damages and costs.

Morton Galane
Attorney for Plaintiff
1100 First National Bank Building
Las Vegas, Nevada

DEMAND FOR TRIAL BY JURY

The Plaintiff, Sun Valley Disposal Co., Inc., hereby makes demand for a trial by jury of all issues so triable.

Morton Galane
Attorney for Plaintiff
1100 First National Bank Building
Las Vegas, Nevada

ASSIGNMENT

For valuable consideration, the undersigned hereby gives, grants, bargains, sells, assigns, transfers and sets over the full, free, and unencumbered right, title and interest, to Sun Valley Disposal Co., Inc., a Nevada corporation, and its assigns, to its own proper use and benefit, any and all sum or sums of money now due or owing undersigned, and all claims, demands, and cause or causes of action of whatever kind and nature, which undersigned have had, or now have, or may have against:

Clark Sanitation, Inc., a Nevada corporation, and Robert T. Baskin, William H. Briare, Darwin W. Lamb, and James G. Ryan, as the Board of County Commissioners of Clark County, Nevada, or any other person or persons, and each and either of them, whether jointly or severally arising out of, or for any other loss, injury, or damage by undersigned sustained, or cause or causes of action arising, growing out of, or relating to or connected with the property, tangible and intangible, owned by R. J. Collet and used by Sun Valley Disposal Co., Inc. in the garbage collection and disposal service conducted by Sun Valley Co., Inc. or used for bidding for governmental contracts, licenses or franchises by R. J. Collet and Sun Valley Disposal Co., Inc.

And I hereby constitute and appoint the said Sun Valley Disposal Co., Inc. and its assigns, the undersigned's true and lawful attorney and attorneys, irrevocable, with full power of substitution and revocation for me and in my name, or otherwise, but

for the sole use and benefit of the said Sun Valley Disposal Co., Inc., and its assigns, to ask, demand, sue for, collect, receive, compound, and give acquittances for the said claim or claims, or any part thereof.

In witness whereof, the undersigned has signed his name on the date appearing opposite his name.
March 4, 1968. R. J. Collet

State of Nevada
County of Clark—ss.

On the 4th day of March, 1968, before me, the undersigned, a Notary Public in and for the County of Clark, personally appeared R. J. Collet, known to me to be the person whose name is subscribed to the within document and acknowledged that he executed the same.

Witness my hand and official seal.
(Seal)

Margaret Maclary
Notary Public in and for the said
County and State

Appendix C

APPELLEES' RESPONSES TO APPELLANT'S SPECIFICATIONS OF ERROR

<u>Appellant's Assignment of Error</u>	<u>Appellees' Responsive Argument</u>	<u>Page in Appellees' Brief</u>
No. 1	Argument B-1, B-2(a)	
No. 2	Argument B-1, B-2(b)	
No. 3	Argument B-1, B-2(a)	
No. 4	Argument A-2, A-3	
No. 5	Argument A-2, A-3	
No. 6	Argument A-1, C	
No. 7	Argument A-1, C	
No. 8	Argument A-2, A-3	

Appellees' motion for summary judgment was made and granted on two grounds: governmental immunity and interstate commerce. Appellant with its usual aptitude for fragmentation has broken the findings into eight specifications of error.

The first three specifications of error relate to the interstate commerce issue. Appellant claims Appellees engaged in interstate commerce through container leasing (Specification No. 1), garbage collection in another state (Specification No. 2), and purchases from an out-of-state supplier (Specification No. 3). Specification No. 1 and No. 3 are dealt with under Argument B-1 and B-2(a). Specification No. 2 is answered in Argument B-1 and B-2(b).

Specifications of error Nos. 4 through 8 relate to the governmental immunity issue. Specification Nos. 4, 5 and 8 relate to the activities of Appellees and the

Board of County Commissioners in seeking and granting the exclusive franchise. Specification Nos. 6 and 7 relate to attacks on the validity of the franchise. Specifications of error Nos. 4, 5 and 8 are answered in Argument A-2 and A-3; Specification Nos. 6 and 7 in Argument A-1 and C.

No. 22762

IN THE

United States Court of Appeals 1969
FOR THE NINTH CIRCUIT

SUN VALLEY DISPOSAL CO., INC., a corporation,

Appellant,

vs.

SILVER STATE DISPOSAL CO., *et al.*

Appellees.

REPLY BRIEF OF APPELLANT.

FILED

GALANE & WINES,

OCT 30 1968

1100 First National Bank Bldg.,
Las Vegas, Nevada 89101.

WM. B. LUCK, CLERK

Attorneys for Appellant.



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No. 22762

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SUN VALLEY DISPOSAL Co., INC., a corporation,

Appellant,

vs.

SILVER STATE DISPOSAL Co., *et al.*,

Appellees.

REPLY BRIEF OF APPELLANT.

The Appellees have failed to meet the basic issues of the appeal. The Appellees' Brief directs its arguments to a theory of the case wholly inconsistent with the amended complaint and the evidence in support thereof.

I.

The Appellees Erroneously Attempt to Reconstruct the Amended Complaint as a Claim Merely That the Franchise Should Never Have Been Awarded (Reply to Appellees' Brief, Page 8, Lines 31-33).

The amended complaint contains material allegations that would have to be stripped away before the claim can be characterized as nothing more than an attack upon the franchise [R. 120-129]. Substantial evidence in support of these allegations is the subject not only of a factual statement, but an argument of inferences, viewed in the light of applicable decisions (Opening Brief of Appellant, pp. 13-18, 54-56).

Pertinent evidence demonstrates the following: That the Appellees did formulate a specific exclusionary intent prior to the commencement of business by Sun Valley; that from the outset the Appellees expressed hostility toward independents due to their depressive influence on a uniform rate structure in all phases of the garbage industry in Clark County, including not merely pick-up and disposal service, but also container merchandising as a line of interstate commerce; that immediately thereafter acquisitions accompanied by covenants against competition were used to remove independents from the market; that after the entry of Sun Valley as a competitor in the unincorporated area of Clark County the Appellees attempted to achieve their pre-existing goal through predatory trade practices, including among others the subsidization of a losing operation in the unincorporated area of Clark County out of profits derived by reason of doing business in non-competitive territories, such as the City of Las Vegas, and merchandising containers in a separate sub-market; that the Appellees' effort was aided by an agreement or understanding with a California equipment distributor, whereby the Appellees received terms and prices, in connection with the purchase of trucks and equipment, which that distributor would not make available to other garbage collection and disposal operators [R. 2523-2524, 2728, 6397-6400]; that inferential support is in the record that the relationship between the Appellees and the distributor afforded reciprocal advantages of such a nature that a number of separate legal persons, both individual and corporate, were at this point involved in an unreasonable restraint of trade, even if their effort had failed to succeed or success was impossible merely through predatory trade practices with-

out further efforts directed toward proceedings by the County Commissioners on the subject of the exclusive franchise for a garbage pick-up and disposal service in the unincorporated area of Clark County; that the Appellant Sun Valley suffered injury and sustained damages from these trade practices, even if final destruction of its business required the award of the County franchise to the Appellees; that a civil action for damages based upon the anti-trust statute should be sustained where there is proof that a business has been injured by the existence and prosecution of an unlawful combination through private commercial behavior.

In *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S. Ct. 1404, 8 L. Ed. 2d 777, 784 (1962), it is stated:

"In cases such as this, plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each. ' . . . (T)he character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole. *United States v. Patten*, 226 U.S. 525, 544 . . . ; and in a case like the one before us, the duty of the jury was to look at the whole picture and not merely at the individual figures in it.' *American Tobacco Co. v. United States*, 147 F. 2d 93, 106 (CA 6th Cir.). See *Montague & Co. v. Lowry*, 193 U.S. 38, 45, 46, 48 L. Ed. 608, 611, 612."

II.

The Appellees Cannot as a Matter of Law Presuppose That Ordinance No. 214 Was Legislative Action by the County Commissioners Pursuant to the State Enabling Statute Where Circumstantial Evidence Shows That One or More County Commissioners, Motivated by Personal Selfish Reasons Unrelated to the Public Interest, Joined the Unlawful Combination and in Furtherance of Its Object Instigated Action Under the Guise of Legislation but in Reality for the Benefit of the Private Members of the Combination (Reply to Appellees' Brief, Page 10, Lines 11 to 14).

Additional overt acts were committed in furtherance of the objective of the unlawful combination. They involve action taken by the County Commissioners. They are not immune as a matter of law. Proof that a conspiracy has been joined by state officials and that in furtherance of the object of the conspiracy the state officials have imposed an injurious restraint opens the private members of the conspiracy to liability under the anti-trust statute. *Bankers Life and Casualty Co. v. Larson*, (5 Cir. 1958) 257 F. 2d 377, 379; *Harman v. Valley National Bank of Arizona*, (9 Cir. 1964) 339 F. 2d 564, 566; *Alabama Power Co. v. Alabama Electric Cooperative, Inc.*, (5 Cir. 1968) 394 F. 2d 672, 684-685.

- A. The Circumstantial Evidence Supports a Finding That the Unlawful Conspiracy Was Joined by One or More County Commissioners and That Its Object Was Furthered by Action Under the Guise of Legislation, but in Reality for the Benefit of the Private Members of the Combination.

The following evidentiary facts preclude a presupposition as a matter of law that Ordinance No. 214

was passed in 1964 by the Board of County Commissioners pursuant to the enabling statute, NRS 244.183:

(1) That Ordinance No. 214 removed rates to be charged to the public as a bid variable in advance of the invitation for bids [R. 6195, 6197];

(2) That Appellees instigated the form of Ordinance No. 214 which not only fixed the rates in advance, but also reserved the right to rent containers at unregulated rates [R. 6026-6027, 6081, 1121-356 to 357 and 391];

(3) That Commissioner La Porta moved and Commissioner Baskin seconded that Ordinance No. 214 be considered at a meeting on April 20, 1964 [R. 848];

(4) That one week before, on April 13, 1964, La Porta, in the course of his private insurance agency business, was actively involved in negotiations between the Appellees and their bonding company, and in writing La Porta revealed his knowledge that the Appellees had integrated their bonding capacity by using the "deep pocket" financial power of Disposal Investments and Silver State Disposal to sustain losses in selected garbage pick-up territories in two states [R. 3152-3153];

(5) That La Porta wrote bonds and insurance for the Appellees during the period 1957 to 1966 [R. 6170];

(6) That Baskin, in the course of his private restaurant business in the City of Las Vegas, where Appellees' affiliate had an exclusive contract for garbage pick-up and disposal service, not only used the services of Silver State Disposal, but he admitted

that he wanted only one garbage operation in all the pick-up territories of the county and that the Appellees, as the exclusive operator in the City of Las Vegas, should be awarded exclusive rights elsewhere in the county [R. 1496-1501, 1508-1511, 1522-1523];

(7) That on August 7, 1961, about three years before, when the first void franchise was voted by the County Commissioners to Clark Sanitation, Inc., La Porta moved to grant the franchise and Baskin joined in the vote of approval [R. 1121-235 to 236];

(8) That at the meeting of August 7, 1961, the County Commissioners were informed that the Appellees were merchandising containers under a separate rate structure [R. 1121-223 to 225];

(9) That the County Commissioners knew that the first franchise had been annulled by court decree and that La Porta was instigating that a second franchise be awarded [R. 1121-361];

(10) That on June 5, 1964, when Ordinance No. 214 was adopted, Baskin made the motion and La Porta seconded it [R. 849];

(11) That on September 17, 1964, La Porta revealed his knowledge of steps being taken towards the invitation for bids [R. 851-852];

(12) That the invitation for bids was a sham, as discussed on pages 24 to 27 of the Appellant's Opening Brief;

(13) That competition in the bidding process was fettered under the arrangements whereby the County Commissioners reserved the right to consider the bids for the franchise and dumpsite use permit to-

gether, that 75% to 85% of the dumpsite business coming from the City of Las Vegas franchise holder would have to be accepted free of charge and Appellees' affiliate, Silver State Disposal, was the City of Las Vegas franchise holder, that Appellees' affiliate, Silver State Disposal had operated the dumpsite for 13 years, only it owned equipment usable in connection with the dumpsite, only it could insert such equipment in response to one of the bid variables and it enjoyed this advantageous position because of a prearranged deal with the County Commissioners *for private use of federal land held by Clark County purportedly for public use* as a dumpsite [R. 1121-369 to 379, 383, 385, 388, 399, 200 to 207, 297 to 300, 413 to 424];

(14) That County Administrator Cahill stated at the meeting of March 5, 1965, when the bids were considered: "(T)he figures indicate that the Sun Valley is the highest bidder—bidding the most—highest percentage of gross *and I don't believe there is any question, probably no question that they are the best bidder on the franchise collection*, but as to the operation of the dump, it was I think, my opinion that . . . others came in that they were not set up to operate the dump under the terms of the bid as it was proposed to properly operate it. Because, essentially the greatest portion—whatever you may want to say is 75, 80 or 85% of the load of the business of the dump comes from the city franchise." [R. 1121-385];

(15) That the County Commissioners who voted to award the franchise to Clark Sanitation, Inc. on March 5, 1965 had personal selfish reasons unrelat-

ed to the public interest, as discussed on pages 27 to 29 of Appellant's Opening Brief;

(16) That only after a majority vote was cast in favor of Clark Sanitation, Inc., did La Porta announce: "I would like the record to show that my vote is passed, the purpose being that my agency has represented the client as a broker in a neighboring municipality" [R. 1121-392].

Whether there was concerted action may be proven by circumstantial evidence; indeed, such is the only manner in which a case of this kind could ordinarily be established. *Esco Corp. v. United States*, (9 Cir.) 340 F. 2d 1000, 1007; *Girardi v. Gates Rubber Company Sales Division, Inc.*, (9 Cir.) 325 F. 2d 196, 200; *Standard Oil Company of California v. Moore*, (9 Cir.) 251 F. 2d 188, 210, cert. denied, 356 U.S. 975; *Flintkote Company v. Tysfjord*, (9 Cir.) 246 F. 2d 368, 374, cert. denied, 355 U.S. 835.

In *Esco Corp. v. United States*, *supra*, 340 F. 2d at 1007, the court pertinently observed: ". . . it is well recognized law that any conspiracy can ordinarily only be proved by inferences drawn from relevant and competent circumstantial evidence, including the conduct of the defendants charged. * * * a knowing wink can mean more than words."

B. Appellees Have Misplaced Their Reliance Upon Decisions Whose Facts Did Not Disclose Joinder of the Conspiracy by State Officials.

The Appellees have ignored the holdings that proof of a conspiracy, in which the state officials are participants, is subject to the antitrust laws. *Bankers Life and Casualty Co. v. Larson*, (5 Cir. 1958) 257 F. 2d

377, 379; *Harman v. Valley National Bank of Arizona*, (9 Cir. 1964) 339 F. 2d 564, 566; *Alabama Power Co. v. Alabama Electric Cooperative, Inc.*, (5 Cir. 1968) 394 F. 2d 672, 684-685.

The following decisions cited in the Appellees' Brief are distinguishable:

(1) "In *Parker v. Brown*, 317 U.S. 341, 351, 63 S. Ct. 307, 314, 87 L. Ed. 315 (1943), the Court specifically reserved the question of the applicability of the Sherman Act to the case of 'a state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade,' and *Noerr* does not hold that the Act would be inapplicable in such a situation." *Harman v. Valley National Bank of Arizona*, *supra*, 339 F. 2d at 566. Thus, appellant distinguishes *Parker v. Brown*, *supra*, cited on Page 10 of Appellees' Brief, and *Eastern Railroad President's Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), cited on page 14 of Appellees' Brief.

(2) In *Woods Exploration & Prod. Co. v. Aluminum Co. of America*, (S.D. Tex. 1968) 284 F. Supp. 582, cited on Page 11 of Appellees' Brief, the following appears in Footnote 8, 284 F. Supp. at page 589:

"* * * Also, there appears to be a conflict on whether joinder of the state official, who uses his office to impose the restraint makes a difference on whether the private party can be held liable. Compare *Harman v. Valley Nat'l Bank of Arizona*, 339 F. 2d 564 (9th Cir. 1964), with *Miley v. John Hancock Mut. Life Ins. Co.*, 148 F. Supp. 299 (D. Mass. 1957).

* * *

(3) In *Okefenokee Rural Elec. Membership Corp. v. Florida Power & Light*, (5 Cir. 1954) 214 F. 2d 413, 417, cited on Page 13 of Appellees' Brief, there was no suggestion that members of the State Road Department had joined the conspiracy and had refused to grant Okefenokee a permit to run its power line down a state highway in furtherance of the conspiracy, and there was no suggestion that members of the Duval County Commissioners had joined the conspiracy and had acted under the guise of regulation, but in reality to further an anticompetitive conspiracy. Moreover, the *Okefenokee* case was followed four years later by the Fifth Circuit pronouncement in *Bankers Life and Casualty Co. v. Larson*, *supra*, 257 F. 2d at 379, which applied the Sherman Act to a conspiracy participated in by state officials.

Furthermore, in *Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co.*, *supra*, 214 F. 2d at 418, it was stated: "It is not claimed that either the State Road Department or the Board of County Commissioners was acting beyond its respective jurisdiction, or that for any other reason its action was invalid."

(4) In *E. W. Wiggins Airways, Inc. v. Massachusetts Port Authority, et al.*, (1 Cir. 1966) 362 F. 2d 53, cited on Page 15 of Appellees' Brief, there was no evidence of an anticompetitive conspiracy joined by state officials other than the exclusive contract *per se*, which was valid under state law. Therefore, the Court held that the mere conclusionary allegation of conspiracy absent any specification of circumstances other than the exclusive contract was insufficient to state a claim under the antitrust laws.

(5) In *United Mine Workers of America v. Pennington*, 381 U.S. 657, 671, 85 S. Ct. 1585, 1594, 14 L. Ed. 2d 626 (1965), cited on Page 18 of Appellees' Brief, it was stated that the act which injured the plaintiff was:

"(T)he act of a public official who is *not* claimed to be a co-conspirator." (Emphasis added.)

(6) In *S. & S. Logging Co. v. Barker*, (9 Cir. 1966) 366 F. 2d 617, it was merely held that the federal officials of the United States Forest Service, as distinguished from the private outsiders, were immune from suit under the antitrust laws, because their action did not exceed their unqualified discretionary power under federal regulation to reject all bids with or without reason. The limits of this decision are discussed in Tustin, "*Immunity of Federal Officials From Civil Liability in Antitrust Suits*," 19 Stanford L. Rev. 1101 (1967). The concurring opinion implies that the joinder of the official makes a difference on whether the private party who is a member of the unlawful conspiracy is liable under the antitrust statute.

In sum, Appellant's Opening Brief, Page 70, Lines 11 to 14, correctly stated:

"In the authorities cited in the memorandum opinion of the court below, the governmental action which furnished immunity from the antitrust law was clearly valid governmental action in compliance with state law."

It is unjustified for the Appellees' Brief, Page 20, Lines 8 to 12, to argue that the holdings adopted in the

memorandum opinion of the court below were not mentioned by Appellant Sun Valley for consideration by this Court. They are distinguishable cases.

III.

The Appellees Have Erroneously Assumed That Summary Judgment Was Granted on the Same Issues as Are Here Involved in Woods Exploration & Prod. Co. v. Aluminum Co. of America, (S.D. Tex. 1968) 284 F. Supp. 582 (Reply to Appellees' Brief, Page 11, Lines 27 to 32).

The Appellees have failed to perceive the factual situation revealed by the decision, which distinguishes it from the case at bar.

Firstly, the decision did not depart from two basic principles, namely: (1) That it is an open question whether joinder of a conspiracy by a state official, who uses his office to impose the restraint, makes a difference on whether the private party can be held liable (248 F. Supp. at Page 589, Footnote 8); (2) That where a state statute vests the power in a private party to commit the injurious act, the act, even if it is performed in the course of dealing with the state agency, may be deemed private commercial behavior within the purview of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, *supra*, 370 U.S. 690, since the injury is not deemed to have flowed solely from official action (284 F. Supp. at 593).

The earlier decision in the same case expressly recognized the second principle. The subsequent decision did not modify the principle. It was rendered only after the completion of pretrial discovery disclosed the factual basis for the claims and defenses. That disclosure

included the following evaluation of the relationship between the private party and the state agency (284 F. Supp. at 593):

"The Texas Supreme Court made clear in *Railroad Comm'n v. Woods Exploration & Producing Co.*, 405 S.W. 2d 313 (Tex. 1966), that the Commission alone has the power and the duty to set allowables. The procedure followed by the Commission of requiring the producers to submit forecasts before the allowables are set is no more than a mere 'administrative device.' *Id.* at 319. The figure submitted by the individual producers are not binding on the Commission, and it does not have to set allowables based on their mathematical total. Thus any injury which any producer claims to have suffered because of the allowable assigned to him is an injury directly inflicted by the Railroad Commission and not an injury inflicted by his fellow producers directly or through the exercise of any discretionary power conferred upon them by the State."

By contrast, in the case at bar, the County Commissioners by the publication of bid variables in the invitation for bids delegated to the competing bidders the discretionary power to make the material representations which the County Commissioners were required to fully consider, since the state statute, N.R.S. 244.183(3), stated in its pertinent part:

"* * * The Board of County Commissioners *shall* give full consideration to any application or bid to supply such services * * * and *shall* grant the franchise on terms most advantageous to the County and the persons to be served." (Emphasis added.)

Thus, under the statutory scheme for competitive bidding formulated herein, the bidders were possessed of the power to insert amounts in their applications or bids which the County Commissioners, if they complied with the statutory mandate, were required to consider. Therefore, the trade practice of fraudulent misstatement in a bid, as charged herein, was truly private commercial activity, as distinguished from lobbying, within the purview of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 86 S. Ct. 1404, 8 L. Ed. 2d 777 (1962).

In *Okefenokee Rural Elec. Mem. Corp. v. Florida P. & L. Co.*, *supra*, 214 F. 2d at 416, the alleged fraud consisted of a false argument before the State Road Department which led that agency to deny a permit to the plaintiff to build a power line along a selected highway; but the action which injured the plaintiff was the denial of the permit, which the state agency alone had the power to do regardless of the arguments presented to it.

IV.

The Appellees Have Disregarded the Business Realities of Container Merchandising to Characterize the Industry as Solely a Local Service (Reply to Appellees' Brief, Page 24, Lines 29 to 30).

There is a genuine issue of fact whether Sun Valley's business was destroyed so that it would be eliminated as an independent distributor in the container sub-market pursuant to efforts designed to achieve the goal of keeping independents from having a depressive influence on county-wide container rental rates in the flow of that line of interstate commerce. This jurisdictional-fact issue is intertwined with the merits of

the case. Appellees' Brief, Page 26, Lines 9 to 10, is in error when it cites the absence of facts as to the ability of the Appellees to affect the prices charged for these containers.

The Appellees have evaded answering the evidence as to the merchandising of containers in substantial volume at high profit in the flow of interstate commerce by the use of a phrase, "sophistry of words and legal conceptualizations." (Appellees' Brief P. 22, Lines 3-6). However, the inferential proof supports the finding that the Appellees engaged in a scheme to remove independents so as to keep them from having a depressive influence on the container rental rate structure, that the container rental activity was a separate sub-market, that the flow of interstate commerce continued until the containers reached the customers of the garbage pick-up and disposal service and that the business of Sun Valley was destroyed by the existence and prosecution of the anticompetitive scheme (Opening Brief of Appellant, pp. 6-18, 37-45).

The Appellees have disregarded the business realities of container merchandising in order to characterize the industry as a purely local service, "to wit, the service of garbage collection and disposal" and have thus misplaced their reliance on *Page v. Work*, (9 Cir. 1961) 290 F. 2d 323, cert. denied, 368 U.S. 875 (1962).

V.

The Appellees Have Failed to Perceive the Significance of the Purchase of Equipment Manufactured Outside of Nevada, Viewed Against the Reciprocal Relationship Between Appellees as an Outlet and a California Distributor of Equipment in Interstate Commerce in Competition With Comparable Equipment Sold by Other Distributors (Reply to Appellees' Brief, Page 25, Lines 18 to 21).

Pages 20 to 21 of the Opening Brief for Appellant spells out in detail the interrelationship between the Appellees and Arata Pontiac. Pages 52 to 54 of the Opening Brief for Appellant argues the impact of the reciprocity upon interstate commerce. It is illogical to assume as a matter of law that the capture of all available outlets in a territory for equipment by a single interstate supplier does not provide a jurisdictional basis for an anti-trust claim.

The Court cannot assume as a matter of law that the freedom of the surviving garbage pick-up and disposal companies to buy equipment from other manufacturers has not been hobbled by the Appellees' business arrangements with Arata Pontiac.

The Court cannot assume as a matter of law that the affiliated ownership, management and control of the Appellees by Arata Pontiac through interlocking directorates was not part and parcel of a deliberate and calculated purpose of Arata Pontiac to control the operating companies' purchase of equipment, and that no compulsion or reciprocal control had been exercised to control such purposes. The record contains evidence of the advice given by Arata Pontiac to Appellees as

to the maximum number of front-end loaders to purchase for large-volume commercial pick-ups, since Arata's manufacturer, Leach, did not at the time manufacture front-end loaders and Arata Pontiac wanted to maximize the Leach sales under its franchise with Leach and in turn minimize Appellees' purchase of competitive equipment [R. 2827-2830].

The Court cannot assume as a matter of law that the Appellant Sun Valley was not hobbled in its ability to purchase equipment in interstate commerce. The record contains evidence that Arata sold equipment at cost to Appellees, contrary to a long-established policy [R. 2523, 6397-6400]. It may reasonably be inferred that the Appellant Sun Valley had no supplier available to forego a profit on the sale of equipment. Furthermore, the Appellant Sun Valley should have been able to purchase Leach equipment on the same terms and conditions as the Appellees; and since Arata Pontiac had the Leach franchise for Southern Nevada, it is obvious that the Appellant Sun Valley was at a disadvantage.

These principles are clearly cognizable under the antitrust law. In *United States v. Yellow Cab Co.*, 332 U.S. 218, 224, 67 S. Ct. 1560, 1563, 91 L. Ed. 2010, it was held that a cause of action under the anti-trust law was alleged in the third charge, namely, a conspiracy to restrain and monopolize the sale of taxicabs by control of the principal companies operating them in Chicago, New York, Pittsburgh and Minneapolis. For a subsequent appeal, see 338 U.S. 338.

VI.

The Appellees Have Erroneously Isolated the Page, Arizona, Operation Prior to 1964 From Substantial Evidence of a Continuing Interstate Enterprise (Reply to Appellees' Brief, Page 31, Lines 12 to 18).

Appellees have completely ignored the detailed pertinent facts discussed on Pages 18 to 19 of the Opening Brief for Appellant. They ignore the integrated enterprise, in which the Appellees combined their corporate and individual bonding capacities to maintain in two states a group of saleable franchises. [R. 2964, 3018-3019, 3031, 3152-3155, 3370, 3373, 3380-3391]. They ignore the fact that after 1964 the tradename of Henderson Disposal Service, which was used in Nevada, was licensed for use in Arizona, and the bonding capacity of the Arizona licensee was sustained by that of the Appellees so that the functioning of the integrated enterprise on a two-state basis through the affiliated license has continued at all times material thereafter until the filing of the complaint [R. 2371-2373, 3747-3750, 3752-3753, 3759-3762].

VII.

The Appellees Have Erroneously Presupposed That the Federal Jury Must Award a Verdict Nullifying a Franchise Under State Law (Reply to Appellees' Brief, Pages 33 to 37).

The federal jury awards damages. No decree is entered by the jury annulling a franchise under state law. The power of a jury to award damages is well recognized.

A jury is fully equipped to resolve one or more of the following issues: (1) Whether the action of the

County Commissioners was under the guise of legislation, but in reality in furtherance of an anticompetitive conspiracy joined by those commissioners; (2) whether the invitation for bids was a sham that evaded free competition on a common basis.

In making its determinations, the jury does not interpret Nevada state law. To the extent such an interpretation is essential, that is the function of the court. Indeed, the federal court will probably look to the lower state court decision, as fully discussed on Page 73 of the Appellant's Opening Brief. There need be no decree annulling the franchise.

The effect of the state law on the validity of the franchise is not dispositive of the federal antitrust claim. See *Knuth v. Eric-Crazeford Dairy Coop. Association*, (3 Cir. 1968) 395 F. 2d 420, which reversed the trial court not only for failure to recognize the antitrust claim, but also for failure to adjudicate the State claim under pendent jurisdiction. The amended complaint herein alleges pendent jurisdiction over the State claim [R. 108, lines 8-10].

It is immaterial that the Appellant has instituted a damage action in state court, based on fraud and the invalidity of the franchise; and it is immaterial that, in the state court damage action, there has been joined a claim against the County Commissioner for invalidation of the franchise. Appendix B, annexed to Appellees' Brief, sets out the state court complaint. It does reveal that Appellant has invoked every available remedy in its behalf. It does not deprive the federal court of jurisdiction.

Contrary to Appellees' Brief, Page 33, Line 17, Appellant Sun Valley is not pursuing the "Golden Fleece" of treble damages.

In *Bruice's Juices v. American Can Company*, 330 U.S. 743, 571-572, 67 S. Ct. 1015, 1019, 91 L. Ed. 1219 (1947), Mr. Justice Jackson stated:

"Where the interests of individuals or private groups or those who bear a special relation to the prohibition of a statute enforced, it is not uncommon to permit them to invoke sanctions. This stimulates one set of private interest to combat transgressions by another without resort to governmental enforcement agencies. Such remedies have the advantage of putting back of such statutes a strong and reliable motive for enforcement, which relieves the Government of cost of enforcement. * * * *It is clear Congress intended to use private self-interest as a means of enforcement and to arm injured persons with private means to retribution when it gave to any injured party a private cause of action in which his damages are to be made good threefold, with costs of suit and a reasonable attorney's fee.*" (Emphasis added).

Conclusion.

For the reasons heretofore given in their Opening Brief, fortified by this reply, Appellant respectfully urges that the Court reverse the summary judgment entered herein.

Respectfully submitted,

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By MORTON GALANE,

Attorneys for Appellant.



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No. 22764

In the
United States Court of Appeals
For the Ninth Circuit

FRANK A. EYMAN, Warden, Arizona State
Prison,

Respondent-Appellant,

vs.

JOSEPH ALVIN SCHANTZ,

Petitioner-Appellee.

Brief of Appellee

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States Amendment V:

"No person shall . . . be compelled in any criminal case to be a witness against himself . . ."

Constitution of the United States Amendment VI:

"In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of Counsel for his defense."

Constitution of the United States Amendment XIV:

". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the law."

ISSUES PRESENTED FOR REVIEW

As discussed in Sec. II of the argument, the precise constitutional issues raised by the Appellant in this case were not presented below, and thus were not preserved. As now presented to this Court, the issues are as follows:

1. Does the admission of evidence showing that an accused has refused to submit to psychiatric examination requested by the State, and comment upon that evidence by the prosecutor, violate an accused's right to due process of law, where there was no authority for the examination, the request was made without any notice to the accused or his counsel, and counsel was not present?

2. Does the admission of this evidence, and the comment thereon violate an accused's privilege against self-incrimination?

3. Does the admission of this evidence, and the comment thereon violate an accused's right to assistance of counsel?

Subsidiary issues are whether the trial court should have held a hearing to determine the admissibility of this evidence, and whether the admission, if error, was harmless.

STATEMENT OF THE CASE**A. Proceedings Below.**

This proceeding arose as a Writ of Habeas Corpus filed by the appellee, Joseph Alvin Schantz, in the Federal District Court for the District of Arizona on November 7, 1967. Mr. Schantz was at that time imprisoned at the Arizona State Prison, Florence, Arizona, by the respondent, Frank Eyman, Warden of the Arizona State Prison, pursuant to a judgment of the Superior Court of Arizona, Maricopa County, entered on January 28, 1963, wherein Mr. Schantz was adjudged guilty of murder in the second degree. That judgment was affirmed on appeal by the Supreme Court of

Arizona on June 23, 1965. 98 Ariz. 200, 403 P.2d 521 (1965). Certiorari was denied by the United States Supreme Court on January 24, 1966. 382 U.S. 1015, 86 S. Ct. 628 (1966). Meanwhile, on July 13, 1965, Mr. Schantz had filed a motion for new trial based upon newly discovered evidence. That motion was denied on March 31, 1966. The denial of that motion was affirmed by the Supreme Court of Arizona on May 11, 1967. 102 Ariz. 212, 427 P.2d 530 (1967). Throughout these proceedings Mr. Schantz was at liberty, on bond. He was thereafter imprisoned pursuant to a sentence of not less than fifteen nor more than sixteen years imposed by the Superior Court of Arizona, Maricopa County, in Cause Number 40470. His petition for a Writ of Habeas Corpus was granted on January 28, 1968 by United States District Judge William P. Copple and this appeal followed.

B. Jurisdiction.

The District Court had jurisdiction to grant the Writ of Habeas Corpus under 28 U.S.C. Sec. 2241 (c) (3). The petition was granted on January 28, 1968. Notice of appeal was filed February 2, 1968 by the appellant, Frank A. Eyman. This court has appellate jurisdiction pursuant to 28 U.S.C. Sec. 2253.

C. Facts.

After the hearing below, the District Court accepted as accurate the following uncontested factual allegations of the petitioner:

"Before trial, the County Attorney of Maricopa County had made a motion in Maricopa County Superior Court seeking an order allowing two State's psychiatrists to examine the petitioner. On the day set for hearing this motion the County Attorney withdrew it. The same day the County Attorney sent Dr. Paul

Bindelglas, a psychiatrist, to the petitioner's home, unannounced, and without notice to either the petitioner or his counsel.

"At trial Dr. Maier Tuchler, a psychiatrist, was called by the petitioner. He testified that he had examined the petitioner on numerous occasions following the offense, and gave as his opinion that the petitioner, at the time of the offense, did not know the nature and significance of his acts and did not know right from wrong. He further testified that the petitioner had total amnesia respecting the events related to the homicide, and that his efforts to bring back the petitioner's memory were unsuccessful; that an amnesia state exists where the emotional state predominates without the conscious awareness of the individual; and that acts in such a state are outside the person's deliberate, volitional conscious awareness.

"In rebuttal of this expert testimony elicited by the petitioner, the State offered no testimony concerning insanity or mental condition. Instead, the County Attorney called Dr. Bindelglas to the stand, qualified him as an expert in psychiatry, and had him testify, over the strenuous objection of the petitioner, as follows:

"Q. BY [PROSECUTING ATTORNEY]: You went for the purpose of performing a psychiatric examination?

"A. Yes.

"Q. Did you ask him to take a psychiatric examination?

"A. Yes.

"Q. And did you tell him you were from the County Attorney's office?

"A. Yes, I did.

"Q. And did he agree to a psychiatric examination?

"A. He did not." (*See* 98 Ariz. at 213)

"There was no question that Dr. Bindelglas was a total stranger to the petitioner, and that no notice

whatsoever of this proposed examination was given to either petitioner or his counsel.

"In summation, the County Attorney argued:

"Now, ladies and gentlemen, there is a saying that a person who seeks justice in a court of law, should come in with clean hands, and I submit to you, ladies and gentlemen, that if this was a bona fide, good faith defense of insanity, why didn't he permit our psychiatrists to examine him?

"He said he was from the County Attorney's office. He said he was a psychiatrist. He asked to examine him.

"If this is a good faith defense, and this man has nothing to hide, why didn't he let our psychiatrist examine him?

"His refusal to let our man examine him shows bad faith. We would have liked to have him examined . . ."

"Ladies and gentlemen, I submit to you that this is not a good faith defense of insanity."

"On appeal to the Supreme Court of Arizona, Dr. Bindelglas' testimony was held to have been properly admitted. *State v. Schantz*, 98 Ariz. 200, 403 P.2d 521 (1965)." (Petitioner's Memorandum in Support of Petition for Writ of Habeas Corpus, pp. 2-3)

SUMMARY OF ARGUMENT

Under the circumstances of this case, as set forth in the Statement of Facts adopted by the Court below, it was fundamentally unfair to allow the prosecutor to introduce evidence of the petitioner's refusal to submit to psychiatric examination, and to argue to the jury that this evidence demonstrated that the petitioner's defense of insanity was made in bad faith. The admission of this evidence, and the comments thereon, allowed the prosecutor to take advan-

tage of a situation calculated to produce the refusal, because of the lack of notice, the lack of counsel, and the complexity of the legal issues raised by this deceptively simple request. At best, the inference argued by the prosecutor was weak, and no more compelling than a great number of other inferences to be drawn from the evidence. In a capital case, such as this, it was incumbent upon the Court and prosecutor to exercise extreme care to assure that the defendant was treated fairly both before and during trial. The actions of the prosecutor in obtaining this evidence, his use of the evidence at the trial, and his argument thereon was unfair. It was calculated to mislead the jury, and to prejudice it against the insanity defense, though the prosecutor had no competent evidence upon which to base that argument. This entire procedure was violative of the petitioner's right to due process of law guaranteed by the fourteenth amendment.

In addition to being fundamentally unfair, this procedure violated the fifth amendment by requiring the petitioner to either give potentially incriminating evidence or to suffer a penalty for refusing to do so. Anything he said to the psychiatrist could have been used against him, both as to sanity and as to guilt. In this regard the psychiatrist was no different than any other investigator employed by the State to gather evidence to convict the defendant. Certainly he was looked at no differently by the defendant. Thus, the defendant had a constitutional right to refuse the requested examination; and the introduction into evidence of his refusal, and comment thereon by the prosecutor penalized him for asserting that right. Such a penalty violates the privilege against self-incrimination. In fact, such a penalty violates the privilege against self-incrimination whether or not the defendant had a *constitutional* right to refuse, so long as he had the right to refuse, whatever its origin.

Because the confrontation between Dr. Bindelglas and Mr. Schantz came without notice, and because the decision of whether to submit to examination then, later, or ever, involved extremely complex legal issues, Mr. Schantz was entitled to have counsel present to advise him concerning all of his rights and privileges and the probable consequences of his decision. No doubt counsel's presence at such a confrontation would also have made the defendant's right to cross-examine Dr. Bindelglas much more meaningful. It is difficult to conceive a situation where the advice of counsel is more desperately needed; and to allow evidence of a defendant's refusal in the absence of counsel is clearly violative of the sixth amendment.

The admission of this evidence was error. It was constitutional error. As such, it requires that the petitioner be granted a new trial unless the State can show beyond a reasonable doubt that the error was harmless—that it did not contribute to his conviction. This the State has not done, and cannot do.

ARGUMENT

I. Jurisdiction.

In his petition for a Writ of Habeas Corpus Mr. Schantz alleged jurisdiction under 28 U.S.C. Sec. 2241 (c) (3). This jurisdictional allegation was not and is not contested by the State (see Return and Response to Petition for Writ of Habeas Corpus). The District Court, however, considered this issue at length and ruled that it did have jurisdiction to grant the writ. (See District Court's Opinion and Order, pages 3 and 4). Unquestionably, the District Court had jurisdiction under 28 U.S.C. Sec. 2241 (c) (3). *Daugharty v. Gladden*, 257 F.2d 750 (9th Cir. 1958). However, should this court determine it necessary, further authority will be presented by the petitioner.

II. The State's Failure to Present Argument Below.

At the outset it should be noted that none of the arguments or theories for reversal contained in the State's opening brief were presented to the District Court either by responsive pleading or at the time of the oral argument (see Response to Petition for Writ of Habeas Corpus; Opinion and Order of the District Court, page 4).

The petitioner contended below that the introduction of evidence pertaining to Mr. Schantz' refusal to undergo a psychiatric examination, and the prosecutor's comments upon that evidence constituted a denial of his privilege against self-incrimination under the fifth amendment to the Constitution of the United States, a denial of his right to assistance of counsel under the sixth amendment to the Constitution of the United States and a denial of his right to due process of law under the fourteenth amendment to the Constitution of the United States. The State took the position throughout the proceedings below that the question concerning the admissibility of the psychiatrist's testimony (hereafter "the Bindelglas testimony") was "one of *relevancy* and not a violation of the Fifth, Sixth and Fourteenth Amendments." (Response to Petition for Writ of Habeas Corpus, page 3). Thus, the State argued that, because the testimony was relevant, it mattered not that its introduction might have violated Mr. Schantz' constitutional rights. No cases were cited to the District Court by the State, nor did the court have the benefit of any of the arguments and theories contained in the State's brief before this Court.

Now, for the first time in this litigation, the State offers a completely new argument, and abandons its earlier position. It now contends that the Bindelglas testimony was properly admitted and that the District Court erred in

granting the writ of habeas corpus for the following reasons:

1. There was no compulsion upon Mr. Schantz to speak to Dr. Bindelglas;
2. The evidence sought by Dr. Bindelglas was not testimonial in nature;
3. The evidence sought by Dr. Bindelglas was not incriminating in nature;
4. The privilege against self-incrimination does not apply where a defendant's sanity has been placed in issue;
5. The confrontation between Dr. Bindelglas and Mr. Schantz was not at a "critical stage" of the proceedings;
6. The prosecutor's comments upon the Bindelglas testimony was not error because it applied to the sanity issue rather than the guilt issue; and
7. If it was error to admit the Bindelglas testimony and to comment thereon, that error was "harmless."

In presenting this new argument the State ignores the well settled rule of appellate procedure that there can be error only with respect to matters presented to the trial court, and limited to the contentions made to it as the basis for requested action, *Indiviglio v. United States*, 249 F.2d 549 (5th Cir. 1957). In *Indiviglio v. United States*, *supra*, the court stated the rule as follows:

"The general rule . . . is that an appellate court will consider only such questions as were raised and reserved in the lower court.' 'It is well settled that the theory upon which the case was tried in the court below must be strictly adhered to on appeal or review. Under this rule a party will not be permitted, in the appellate or reviewing court, to assume a position in-

consistent with that occupied by him in the trial court with respect to the grounds or theory of recovery or relief or of defense or opposition, the nature or sufficiency of pleadings, the admissibility or sufficiency of evidence, or the burden of proof.'

"The general rule that an appellate court will consider only such questions as were raised in the lower court, and the rule requiring adherence to the theory pursued below, operate ordinarily to preclude the consideration, on appeal or review, of grounds of defense or of opposition not asserted and relied on in the trial court.'" 249 F.2d at 560.

Having failed to present to the district court any of the arguments or theories now urged, the State should be precluded from presenting them for the first time on appeal. For that reason, though these matters will be considered below, the case should be decided on the basis of the pleadings and arguments presented to the district court.

III. The Introduction of the Bindelglas Testimony and the Prosecutor's Comments Thereon Violated Mr. Schantz' Right to Due Process of Law.

A. SCOPE OF THE CONSTITUTIONAL QUESTION.

The petitioner has not urged, and does not urge herein, that a state cannot, consistent with the due process clause of the Constitution of the United States, require a criminal defendant to submit to a psychiatric examination in a case where the defendant's sanity has been placed in issue. The question is not raised here. Rather, the question is whether, under the circumstances of the confrontation between Dr. Bindelglas and Mr. Schantz, and in the absence of a court order or any other authority for a psychiatric examination, it was fundamentally unfair to allow evidence of Mr. Schantz' refusal to be examined, and to allow comment upon that evidence by the prosecutor.

B. THE LAW.

The due process clause of the fourteenth amendment to the Constitution of the United States requires more than notice and hearing. *Mooney v. Holohan*, 294 U.S. 103, 55 S. Ct. 340, 79 L. Ed. 791 (1935). The due process clause "embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." *Mooney v. Holohan*, *supra*, 294 U.S. at 112, 55 S. Ct. at 342. The scope of due process has been variously defined by the Supreme Court, but, generally, it embodies the concept of "fair play." *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948); *Irvin v. Dowd*, 366 U.S. 717, 81 S. Ct. 1639, 6 L. Ed. 2d 751 (1961); *Dennis v. Dees*, 278 F. Supp. 1354 (E.D. La. 1968). As stated in *Irvin v. Dowd*, *supra*, the due process clause requires "a fair trial in a fair tribunal." And in *In re Oliver*, *supra*, the requirement was stated:

"It is 'the law of the land' that no man's life, liberty or property be forfeited as a punishment until there has been a charge fairly made and fairly tried in a public tribunal." 333 U.S. at 278, 68 S. Ct. at 510.

The requirement was perhaps best stated in *Brady v. Maryland*, 373 U.S. 83, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963), when the court stated "... our system of administration of justice suffers when any accused is treated unfairly." 373 U.S. at 87, 83 S. Ct. at 1197.

This requirement has been applied in a number of varying situations. In *Miller v. Pate*, 386 U.S. 1, 87 S. Ct. 785, 17 L. Ed. 2d 690 (1967), the Supreme Court condemned as unfair the actions of a Prosecuting Attorney who led a jury to believe that stains on clothing were blood, when he knew that at least some of the stains has been caused by paint. The court held that the fourteenth amendment

protects the criminal defendant from such unfair prosecution tactics.

Brady v. Maryland, supra, and *Ashley v. Texas*, 319 F.2d 80 (5th Cir. 1963), hold that the suppression of relevant evidence which would be favorable to the defendant violates the due process requirement of fairness irrespective of the prosecutor's intent in withholding the information.

In *Dennis v. Dees, supra*, the court held that it was unfair, and thus a violation of the fourteenth amendment, to require a defendant to wear prison garb during his trial. See also *Giles v. Maryland*, 386 U.S. 66, 87 S. Ct. 793, 17 L. Ed. 2d 737 (1967) and *Williamson v. United States*, 311 F.2d 441 (5th Cir. 1962).

C. THE CIRCUMSTANCES OF THE REFUSAL.

It is undisputed that Dr. Bindelglas was unknown to Mr. Schantz. Though he was hired by the County Attorney's Office, and was no doubt an agent of the County Attorney's Office at the time of the confrontation, there was no court order or other authority for him to conduct the examination, nor any which required Mr. Schantz to submit to it. No one told Mr. Schantz that Dr. Bindelglas was coming nor that he would be required to submit to an examination. Though the prosecutor was well aware that Mr. Schantz was represented by counsel, that counsel was not informed of Dr. Bindelglas' impending visit.

Mr. Schantz refused to talk to Dr. Bindelglas. The record does not reflect why he refused to talk to him. He may have refused, as do many people, to talk to anyone whom he did not know. He may have been told not to talk to anyone about the case, or he may have felt that his attorney would not want him to talk to anyone about the case. He may have felt that, if an examination was to occur, it should be con-

ducted under proper circumstances and not at his home without prior notice to either him or his counsel.

Nothing in the record reflects that Mr. Schantz was informed of any of his rights or duties concerning the proposed psychiatric examination, either by Dr. Bindelglas, by representatives of the state, or by his own counsel. Instead he was caught alone, without proper advice and under unusual circumstances to decide correctly all of the legal ramifications of his act—a decision to which the State now devotes 48 pages of brief. Mr. Schantz chose the only method then available to him to protect his rights—the only method reasonably to be expected—he chose to remain silent.

There is little doubt that the prosecutor expected him to remain silent—to refuse to be examined. The prosecutor sent Dr. Bindelglas to Mr. Schantz' home under circumstances which were calculated, not to obtain a psychiatric examination, but to obtain what was in fact obtained, an unconsidered and unadvised refusal by Mr. Schantz. To allow the state to use this evidence—clearly expected, and procured through the act of the prosecutor—violates the fundamental fairness requirement of the fourteenth amendment's due process of law provision.

Perhaps the case most nearly parallel to the one at bar is *Hamrick v. Baily*, 386 F.2d 390 (4th Cir. 1967). In that case the Fourth Circuit Court of Appeals held that the prosecution's use of evidence which was misleading, though true, violated the principles of the fourteenth amendment requiring fair play. The same issue is squarely before this Court. In this case the prosecutor put before the jury evidence of Mr. Schantz' refusal to submit to the requested examination, and argued that this evidence showed that his defense of insanity was made in bad faith. This evidence was clearly misleading. The jury could only speculate as to Mr. Schantz' reason for refusing; and the conclusion that

his defense was made in bad faith was certainly no more called for than any other conclusion. In addition, it was wholly unfair to argue that his refusal was predicated upon a fear that he would be found sane if examined, when the prosecutor had timed the request so that he would certainly refuse. It is difficult to conceive a more unfair tactic or one which was more likely to mislead the jury.

The State has admitted that the probative value of this evidence was very slight. (See Appellant's Opening Brief, pp. 30 and 43). It is, thus, all the more clear that the introduction of this evidence and the prosecution's argument based thereon was unfair. The use of this admittedly weak evidence, procured by the deliberate act of the prosecutor, as a basis for arguing that the defense of insanity was not made in good faith, clearly violated Mr. Schantz' right to a fair trial in a fair tribunal guaranteed by the fourteenth amendment to the Constitution of the United States, and requires a new trial.

IV. The Introduction of the Bindelglas Testimony and the Prosecutor's Comments Thereon Violated Mr. Schantz' Privilege Against Self-incrimination.

A. SCOPE OF THE CONSTITUTIONAL QUESTION.

The question before this Court is whether Mr. Schantz' privilege against self-incrimination was violated by the admission of testimony and comment thereon which was the product of Dr. Bindelglas' unannounced confrontation with Mr. Schantz while he was alone at his home. It must be stressed that the following issues are not before this Court: whether an accused can be forced to submit to a court ordered psychiatric examination; whether the accused has a right to counsel during a psychiatric examination which has been ordered by a court; and whether a prosecutor has a right to comment on a defendant's refusal to obey a court

order requiring some type of examination or nontestimonial act.

The principles to be applied to this case must be focused on a defendant's rights at the time a *request* for a psychiatric examination is made rather than at the time an actual examination is performed. The State never had any authority to require Mr. Schantz to submit to an examination. No examination was ever given. The presence or absence of rights incident to such an examination are hard questions which may well come before a future court. They are not at issue in this case.

B. THE EVIDENCE.

1. The general law.

The fifth amendment has long been recognized as protecting citizens from two distinct governmental abuses. States may not place a defendant in a position where he has no alternative but to give the state testimonial evidence which may be used against him. *Malloy v. Hogan*, 378 U.S. 1, 84 S. Ct. 1489, 12 L. Ed. 2d 653 (1964), *Bond v. United States*, 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886).

"The privilege against self-incrimination, safeguarding a complex of significant values, represents a broad exception to governmental power to compel the testimony of the citizenry. The privilege can be claimed in any proceeding, be it criminal or civil, administrative or judicial, *investigatory* or *adjudicatory*, . . . (citations omitted) and it protects any disclosure which the witness may reasonably apprehend could be used in a criminal prosecution or which could lead to other evidence that might be so used." *Murphy v. Waterfront Comm'r*, 378 U.S. 52, 94, 84 S. Ct. 1594, 1611, 12 L. Ed. 2d at 678 (1964) (White concurring) (Emphasis added).

To make this privilege meaningful, the court has read an additional or corollary protection into the content of the fifth amendment. That is that a person cannot be penalized in court for invoking its protection. See, *e.g.*, *Griffin v. California*, 380 U.S. 609, 85 S. Ct. 1229, 14 L. Ed. 2d 106 (1965). Cf., *Konigsberg v. State Bar*, 353 U.S. 252, 77 S. Ct. 722, 1 L. Ed. 2d 810 (1957):

"The privilege against self-incrimination would be reduced to a hollow mockery if its exercise could be taken as equivalent either to a confession of guilt or a conclusive presumption of perjury. As we pointed out in *Ullmann*, a witness may have a reasonable fear of prosecution and yet be innocent of any wrongdoing. The privilege serves to protect the innocent who otherwise might be ensnared by ambiguous circumstances." *Slochower v. Bd. of Educ.*, 350 U.S. 551, 557-58, 76 S. Ct. 637, 641, 100 L. Ed. 692 (1956).

This corollary rule protects a defendant from being penalized in court in any way for invoking the protection of the fifth amendment. Any action by the prosecution which "cuts down on the privilege by making its assertion costly" is unconstitutional, *Griffin v. California*, *supra*, 380 U.S. at 614, 85 S. Ct. at 1233. And in determining whether any penalty is to be allowed, a court must be certain that the defendant could not possibly be exercising his fifth amendment rights before it permits the prosecutor to penalize him in any way for his actions. In *Hoffman v. United States*, 341 U.S. 479, 71 S. Ct. 814, 95 L. Ed. 946 (1951), the Court, in dealing with a refusal to answer in-court questions, held that it must be "*perfectly clear* from a careful consideration of all the circumstances in the case, . . . that the answers *cannot possibly* have such tendency to incriminate." *Hoffman v. United States*, *supra*, 341 U.S. at 488, 71 S. Ct. at 819.

There is no reason why the burden should be any different for out-of-court confrontations. The possibilities for abuse are much greater and the protections immediately available to the defendant are much more limited. The only thing he can safely do is refuse to cooperate with the investigators until he learns what alternatives are available to him.

Under *any* standard of proof Joseph Schantz' rights against self-incrimination were violated by the evidence and comment on his refusal to allow Dr. Bindelglas to examine him. The only way he could protect himself was to refuse the examination. By allowing evidence of that refusal and comment on it, the court made Mr. Schantz' assertion of his rights "costly" in violation of the Constitution of the United States.

2. Application to the Bindelglas testimony.

- a. Mr. Schantz' refusal was the product of compulsion under the circumstances which faced him.

The State argues that the fifth amendment doesn't apply to this case because "there was no compulsion." Appellant's Opening Brief at 8. Whether or not Mr. Schantz' refusal was the product of compulsion has nothing to do with whether or not the State used his refusal in a manner so as to penalize him for exercising his privilege against self-incrimination. However, the appellant's refusal in this case *was* the product of compulsion because he was faced with an impossible choice. Under the State's theory of this case it could not lose. If Mr. Schantz submitted, the State might have obtained testimonial evidence which could be used to secure his conviction (see *infra*). If he refused to submit, it could use that refusal against him.

- b. Mr. Schantz was protecting his privilege against self-incrimination in refusing the examination.

At the time Mr. Schantz was confronted by the State psychiatrist, the test in Arizona for the admissibility of confessions or incriminatory statements was "voluntariness." *State v. Izzo*, 94 Ariz. 226, 383 P.2d 116 (1963). Had Mr. Schantz not refused the examination, any statements he made to Dr. Bindelglas would have been admissible against him, not only on the issue of insanity, but also on the twin issues of whether or not he committed the act in question, and what his intent was at that time. *See generally* 2 Underhill, *Criminal Evidence*, Sec. 281, 286 (5th ed. 1956).

In *State v. Johnson*, 69 Ariz. 203, 211 P.2d 469 (1949), the Arizona Supreme Court allowed a newspaper reporter to testify about a confession, voluntarily made in his presence, which contained statements relative both to whether the defendant committed a murder, and to what his intent was at the time. See also *State v. Romo*, 66 Ariz. 174, 185 P.2d 757 (1947), and *State v. Weis*, 92 Ariz. 254, 375 P.2d 735 (1962) (both allowing testimony of state agents as to inculpatory admissions as well as confessions made voluntarily to them). At least two jurisdictions allow psychiatrists to reveal voluntary incriminating statements made by defendants during interviews even when conducted under court order. *Hall v. State*, 210 Ark. 180, 189 S.W.2d 917, 921-22 (1945). *People v. Ditson*, 57 Cal. 2d 415, 369 P.2d 714, 20 Cal. Rptr. 165 (1962), *People v. Combes*, 50 Cal. 2d 135, 363 P.2d 4, 14 Cal. Rptr. 4 (1961). In each of the cases cited above the jury was allowed to consider the statements not only for the purpose of determining sanity, but also for adjudging the guilt of the defendant.

The State contends that there is no privilege in most of the states to refuse to submit to a mental examination. Ap-

pellant's Opening Brief at 19. Disregarding for the moment the crucial distinction that all those cases involved a court ordered examination, exactly such a privilege does exist in Arizona. *Steward v. Superior Court*, 94 Ariz. 279, 383 P.2d 191 (1963). On the very day the State psychiatrist appeared at Mr. Schantz' door, the County Attorney withdrew a motion requesting the Court to allow two state appointed psychiatrists to examine him.

The State implies that the only way Mr. Schantz could obtain the protection of the privilege was to agree to the general inquiry as to an examination and then refuse to give incriminating answers. In the first place such a procedure is not the law, even when the examination is court ordered. *French v. District Court*, 153 Colo. 10, 384 P.2d 268 (1963), *People v. Combes*, *supra*, quoting with approval *People v. Strong*, 114 Cal. App. 522, 300 P. 84 (1931).*

Even if this were the law, to argue that a defendant, suddenly confronted with a request for an examination outside of the presence of his attorneys, should be able to draw such fine distinctions in order to protect his rights is devoid of legal reality. The test in such a situation is whether the defendant could *reasonably apprehend* that a failure to assert his privilege might allow the state to obtain or discover evidence which could be used against him. See *Application of Gault*, 387 U.S. 1, 47-48, 87 S. Ct. 1428, 1454, 18 L. Ed. 2d 527 (1967). The basic tool of a psychiatrist examination for the determination of temporary insanity is, of necessity, a personal interview. See *Rollerson v. United States*, 343 F.2d 269, 274 (D.C. Cir. 1964), Danforth, *Death-*

*"[N]othing in the section compels him to submit to the examination. If he does so the action is purely voluntary, to assert his constitutional rights all that is required is for him to stand mute, and possibly, also, to refuse to permit the examination, when the appointed expert undertakes to proceed. . . ." 114 Cal. App. at 530, 300 P. at 86.

knell for Pre-trial Mental Examination? Privilege Against Self-incrimination, 19 Rutgers L. Rev. 489, 495 (1965), and the authorities cited therein. When the psychiatrist identified himself as an agent of the State and asked Mr. Schantz to submit to a psychiatric examination, Schantz could only understand that the State wanted him to undergo some kind of interview. To hold that he has no constitutional right to refuse under these circumstances would undercut the protection the fifth amendment was intended to provide.

c. Schmerber does not apply to this case.

The State attempts to place this case under *Schmerber v. California*, 384 U.S. 757, 86 S. Ct. 1826, 16 L. Ed. 2d 908 (1966), and other cases holding that an examination of a defendant's person does not violate his rights under the fifth amendment. However subject to dispute such a proposition might be, it has nothing to do with this case. The defendant was not examined; he was asked if he would submit to an examination. His testimonial refusal was entered in evidence against him. The results of a test on his person were not used in any way. What the State used was his refusal to submit to an interrogation by a psychiatrist working for the State. No court had ordered him to talk to the psychiatrist, and it is undisputed that he had a perfect right not to talk to him, just as he had a right not to talk to any other state investigator. In *Schmerber* the Court clearly defined the distinction.

"The distinction which has emerged, often expressed in different ways, is that the privilege is a bar against compelling 'communications' or 'testimony,' but that the source of 'real or physical evidence' does not violate it." *Schmerber v. California*, 384 U.S. at 764, 86 S. Ct. at 1832.

The Court held:

"Since the blood test evidence, although an incriminating product of compulsion, was neither petitioner's testimony nor evidence relating to some communicative act or writing by the petitioner, it was not inadmissible on privileged grounds." 384 U.S. at 765, 86 S. Ct. at 1833.

Because Mr. Schantz's refusal *was* "petitioner's testimony" and *was* "evidence relating to some communicative act" the cases cited by the State as well as *United States v. Albright*, 388 F.2d 719 (4th Cir. 1968), holding that the fifth amendment does not protect a defendant from a court ordered mental examination designed to reveal noncommunicative testimony about the structure of the defendant's mind, do not apply. The evidence and comments which spawned this appeal do not go to the structure or "appearance" of Mr. Schantz's mind. They go straight to a communication made by Mr. Schantz in the exercise of his constitutional rights.

C. ADMISSIBILITY OF EVIDENCE OF REFUSAL.

1. Where there is a constitutional right to refuse.

Malloy v. Hogan, *supra*, held that the privilege against self-incrimination was one of the fundamental rights guaranteed to all persons under the constitution, it also held that the privilege includes (1) both the right to choose to remain silent, and (2) the right to "suffer no penalty" for that silence. *Malloy v. Hogan*, *supra*, 378 U.S. at 8, 84 S. Ct. at 1493. *Griffin v. California*, *supra*, applied the second phase of the privilege against self-incrimination holding that comment, by judge or prosecutor, upon the defendant's failure to testify violated the privilege. There, the court used broad language which made it crystal clear that any

penalty imposed by courts for exercising a constitutional privilege is unconstitutional, because "it cuts down on the privilege by making its assertion costly." *Griffin v. California, supra*, 380 U.S. at 614, 85 S. Ct. at 1233.

The State makes no attempt to deny that Mr. Schantz' refusal to submit to a mental examination was made "costly" by the introduction of the refusal into evidence. The State instead contends that the refusal penalized him only on the issue of sanity rather than guilt. (Brief of Appellant at 22.) The argument, although having at first blush some appeal, is unsound. The framers of the Constitution did not intend for the protection of the fifth amendment to depend upon what kind of penalty a prosecutor could devise for a defendant invoking the privilege.

United States v. Kemp, 13 U.S.C.M.A. 89, 32 C.M.R. 89 (1962), is directly on point. There the highest military court of appeals had the following facts before them:

A murder defendant refused to speak of the offense charged against him during an examination by a psychiatric board. As a result in its report the board stated that it was unable to determine whether the accused was capable of forming the intent necessary for the crime. Of course the report was never in evidence at the court-martial, but the prosecution called a member of that board to testify that the accused was not psychotic, that he could distinguish right from wrong and that he was capable of adhering to the right.

Then the defense, on cross-examination, brought out the fact that the witness had been a member of the board which was unable to form an opinion as to the accused's intent, thereby leaving the erroneous impression that since the time the board had examined the accused the prosecution's psychiatrist had reversed, or at least altered, his diagnosis.

On re-direct the prosecution brought out testimony which explained the board's inability to reach a conclusion.

"A. After the patient's rights were explained to him under the UCMJ, he choose [sic] not to speak about the offense itself at the Board Proceedings." 32 C.M.R. at 97.

In spite of the purpose of the testimony, the court held it to be violative of the defendant's rights against self-incrimination, quoting with approval Justice Black's concurring opinion in *Grunewald v. United States*, 353 U.S. 421, 77 S. Ct. 963, 1 L. Ed. 2d 931 (1957):

"I can think of no special circumstance that would justify use of a constitutional privilege to discredit or convict a person who asserts it. The value of constitutional privileges is largely destroyed if persons can be penalized for relying on them. It seems peculiarly incongruous and indefensible for courts . . . to draw inferences of *lack of honesty* from invocation of a privilege deemed worthy of enshrinement in the Constitution." 353 U.S. at 925-26, 77 S. Ct. at 984-85 (emphasis added).

This language is particularly apropos to the case at bar. The prosecution's admitted use of Mr. Schantz' refusal to be examined was to show that "this is not a good faith defense of insanity."

Fagundes v. United States, 340 F.2d 673 (1st Cir. 1965), also recognizes that any testimony which penalizes the defendant for exercising his privilege against self-incrimination is unconstitutional—regardless of whether it indicates guilt and regardless of whether it would be otherwise relevant to the questions at issue. In *Fagundes*, the defendant took the stand to assert his innocence and advance an alibi defense. On cross examination the prosecution brought forth the fact that upon his arrest he said nothing to the

police about an alibi and asked for a lawyer. This was done not to show evidence of guilt but was done to suggest that his assertion of an alibi was an afterthought. The First Circuit reversed, stating:

“[W]e think it reversible error to permit a jury to draw *any* inference adverse to one accused of crime from his reliance upon his constitutional right to silence and to the advice of counsel. The right to silence on arrest is akin to the right to decline to take the witness stand in one’s own defense.” 340 F.2d at 677. (Emphasis added).

Cf., *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, 16 L. Ed. 2d 694 (1966), *Ivey v. United States*, 344 F.2d 770 (5th Cir. 1965), *Helton v. United States*, 221 F.2d 338, 341-42 (5th Cir. 1955), and *United States v. LoBiondo*, 135 F.2d 130, 131 (2d Cir. 1943).

2. Refusal in the absence of a constitutional privilege.

While it is again respectfully submitted that the petitioner had a constitutional right not to submit to the examination, the existence of a constitutional right is not controlling. The State may not introduce evidence of a defendant’s refusal to submit to examination, and the prosecutor may not comment thereon, whether or not there is a constitutional right to refuse.

Schmerber v. California, *supra*, held that a person had no constitutional right to refuse to submit to a blood-alcohol test. In a footnote the court recognized that this holding would raise the question of whether a person’s refusal to take a test which he had no constitutional right to refuse would be admissible. The court stated:

“If it wishes to compel persons to submit to such attempts to discover evidence, the State may have to

forego the advantage of any *testimonial* products of administering the test—products which would fall within the privilege . . . (Petitioner) argues that the introduction of . . . (evidence of his refusal to take a breathalyzer) and a comment by the prosecutor in closing argument upon his refusal is ground for reversal under *Griffin v. State of California*, . . . (citation omitted). We think general Fifth Amendment principles, rather than the particular holding of *Griffin*, would be applicable in these circumstances, see *Miranda v. Arizona*, 384 U.S. at page 468, n. 37, 86 S. Ct. at 1624." *Schmerber v. California*, 384 U.S. at 765, n. 9, 86 S. Ct. at 1833, n. 9.

The court went on to hold that the petitioner waived this particular ground by failing to object to the prosecutor's questions and statements.

The note in *Miranda* which the Court cited states in part:

"In accord with our decision today, it is impermissible to penalize an individual for exercising his Fifth Amendment privilege when he is under police custodial interrogation. The prosecution may not, therefore, use at trial the fact that he stood mute or claimed his privilege in the face of accusation." *Miranda v. Arizona*, *supra*, 384 U.S. at 468, n. 37, 86 S. Ct. at 1625, n. 37.

Thus the court has succinctly indicated that the privilege against self-incrimination applies to the introduction of a person's refusal to submit to state examination even though he has no constitutional right to refuse the particular examination in question. So long as he had a right to refuse, constitutional or not, his refusal cannot be entered in evidence against him.

The principle is illustrated by *City of Westerville v. Cunningham*, 12 Ohio App. 2d 34, 230 N.E.2d 671 (1967). There the prosecution introduced evidence that the defend-

ant, charged with driving while intoxicated, refused to submit to a blood-alcohol test. At that time in Ohio the defendant had no legal obligation to submit to such a test, just as Mr. Schantz in this case was under no legal obligation to submit to the psychiatric examination. The court held that *Griffin v. California, supra*, and *Malloy v. Hogan, supra*, prevented the prosecution's use of the refusal and that the introduction of the testimony constituted reversible error. The court based its opinion on the language in *Schmerber* set out above. The court went on to apply the "general fifth amendment principles" required in *Schmerber*, and found that the admission of evidence to show the refusal by the defendant to take the tests was a violation of his fifth amendment rights.

The same result was reached by the court in *Gay v. City of Orlando*, 202 So. 2d 896 (Fla. App. 1967), *cert. denied*, U.S., 88 St. Ct. 1052, L. Ed. 2d (1968). The Florida court held that it was error to admit evidence of or to comment upon the defendant's refusal to take a breathalyzer test. The court noted that the defendant was under no obligation to take the test and that his refusal was a self-incriminating testimonial byproduct of the test ruled admissible by *Schmerber*, and held that the fifth amendment prevented its use in the defendant's prosecution.

The application of the rule is particularly appropriate in the instant case, a prosecution for murder. In all murder trials the jury is very alert for any evidence bearing on the possible intent of the defendant at the time the acts in question were committed. There is a great hazard that such a jury might believe the defendant's refusal to take a psychiatric examination resulted from a fear that the examination would disclose evidence of intent to support the state's charges. Because of this danger the admission

of evidence of Mr. Schantz' refusal violated his rights against self-incrimination. *Cf.*, *United States v. LoBiondo*, *supra*; *Helton v. United States*, *supra*; *Ivey v. United States*, *supra*, and *State v. Dearman*, 198 Kan. 44, 422 P.2d 573 (1967) (all dealing with silence in the face of police questions). For judicial recognition of the possibility of a jury's inference of the accused's intent *see*, *United States v. Kemp*, *supra* (refusal based on constitutional grounds).

D. THE PROSECUTOR'S ARGUMENT.

The only evidence the State entered on the issue of petitioner's sanity was the testimony of Dr. Bindelglas that Mr. Schantz refused an examination. In closing argument the prosecutor stressed this evidence. (The entire comment is set out in the facts.) Briefly the comments were all variations on this one theme: "if this is a good faith defense, and this man has nothing to hide, why didn't he let our psychiatrist examine him?". *Mallory v. Hogan*, *supra*, held that the defendant is entitled "to remain silent unless he chooses to speak in the unfettered exercise of his own will and to suffer no penalty, as held in *Twinning*, for such silence." 378 U.S. at 8, 84 S. Ct. at 1493. *Griffin v. California*, *supra*, was a specific application of that rule. In *Griffin* the court held that a prosecutor's comments constituted a penalty for invoking the fifth amendment which is obnoxious to the Constitution.

As was more fully developed earlier in this brief, Mr. Schantz had a constitutional right to refuse to submit to examination by an unannounced state psychiatrist. Any comment by the prosecutor on the defendant's assertion of this right was unconstitutional. *Helton v. United States*, *supra*; *United States v. LoBiondo*, *supra*; *Miranda v. Ari-*

zona, supra; and *State v. Dearman, supra*, all squarely hold that it is reversible error for a prosecutor to comment on a defendant's refusal to talk to authorities investigating a crime.

Such comment is just another way to make the jury infer a lack of honesty on the part of the defendant from his refusal to talk to authorities seeking his conviction. Both *Fagundes v. United States, supra*, and *Grunewald v. United States, supra*, find this practice unconstitutional.

The cases cited by the State as allowing comment on an accused's failure to submit to various tests do not apply to Mr. Schantz' refusal to submit to a mental examination because the State had no authority to require him to acquiesce in such an examination. In each of the cases cited by the State, the courts indicated in dicta that they would allow comment as a form of punishment to coerce a defendant into taking tests which state law authorized its officers to require and which did not violate the defendant's privilege against self-incrimination. *State v. Carey*, 49 N.J. 343, 230 A.2d 384 (1967); *People v. Ellis, supra*, and *People v. Sudduth*, 65 Cal. 2d 543, 421 P.2d 401, 55 Cal. Rptr. 393 (1966).^{*} No court in this country has ever held that *Malloy v. Hogan, supra*, and *Griffin v. California, supra*, allow comment by the prosecutor on a defendant's refusal to cooperate with authorities when those authorities have no right to make him submit to their requests. In fact, *State v. Whitlow*, 45 N.J. 3, 210 A.2d 763 (1965), apparently holds that comment is prohibited even where the state has a right to force a defendant to submit to physical tests. In any case, wherever the line is to be drawn, the privilege extends to the petitioner.

^{*}California also requires a warning before comment is allowed even in that limited situation. *In re Spencer*, 63 Cal. 2d 400, 406 P.2d 33, 46 Cal. Rptr. 753 (1965).

"Another possible penalty to the defendant for refusing to cooperate in a pre trial mental examination would be to permit the judge or prosecutor to inform the jury at the trial of the defendant's refusal [A]nd as a result of the recent case of *Griffin v. California*, it is now clear that the defendant's proper assertion of the privilege may no longer be commented upon." Danforth, *Deathknell for Pre trial Mental Examination? Privilege Against Self-incrimination*, *supra*, 19 Rutgers Law Review at 502-03.

See also *State v. Whitlow*, *supra*, 210 A.2d at 774, *State v. Olson*, 274 Minn. 225, 143 N.W.2d 69 (1966), and *United States v. Kemp*, *supra*.

V. The Introduction of the Bindelglas Testimony Violated Mr. Schantz' Right to Assistance of Counsel.

An accused is entitled to counsel whenever the presence of counsel is necessary to preserve his basic right to a fair trial. *Massiah v. United States*, 333 U.S. 201, 84 S. Ct. 1199, 12 L. Ed. 2d 246 (1964); *Escobedo v. Illinois*, 378 U.S. 478, 84 S. Ct. 1758, 12 L. Ed. 2d 977 (1964); *Powell v. Alabama*, 287 U.S. 45, 53 S. Ct. 55, 77 L. Ed. 158 (1932). This rule was recently applied in *United States v. Wade*, 388 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1967). In that case the Supreme Court held that a criminal defendant has the right to counsel at a police lineup even though neither the lineup itself nor anything the defendant is required to do in the lineup violates his privilege against self-incrimination. The Supreme Court in *Wade* said:

"[I]t is central to that principle that in addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the state at any stage of the prosecution, formal or informal in court or out, where counsel's absence might derogate from the accused's right to a fair trial. 388 U.S. at 226, 87 S. Ct. at 1932.

"In sum the principle of *Powell v. Alabama* and succeeding cases require that we scrutinize *any* pretrial confrontation of the accused to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial as affected by his right meaningfully to cross examine the witnesses against him and to have effective assistance of counsel at the trial itself." 388 U.S. at 226, 87 S. Ct. at 1932.

Again, the question presented on this appeal is not whether there is a right to have an attorney present during a court appointed psychiatric examination, and for that reason the cases cited by the State holding that there is no right to an attorney during such an examination are not in point.*

The precise question at issue here is whether Mr. Schantz was entitled to assistance of counsel when he was confronted at his door by Dr. Bindelglas and *asked* to submit to a psychiatric examination.

It is without dispute that, at the time Dr. Bindelglas made his request, Mr. Schantz had retained counsel known to the prosecuting attorney. The question, then, is whether at this "pretrial confrontation" Mr. Schantz was entitled to the presence of his retained counsel. Under *United States v. Wade, supra*, as well as *Massiah v. United States, supra*, and *Escobeda v. Illinois, supra*, the test to determine whether the presence of his counsel is necessary to preserve the defendant's basic right to a fair trial is whether counsel's presence at that time is necessary in order to adequately prepare for the trial and to meaningfully cross-examine the witnesses against the defendant, or whether it is necessary to preserve the defendant's right to a fair trial by advising

*We note parenthetically that under *Wade, supra*, the right to meaningfully cross-examine witnesses requires an attorney's presence at a psychiatric examination. *In re Spencer, supra*.

him of his rights. See also *People v. Sweeney*, 55 Misc. 2d 793, 286 N.Y.S.2d 506 (1968).

It is obvious from the State's opening brief that the confrontation between Mr. Schantz and Dr. Bindelglas, occurring without notice and without advice concerning the possible legal ramifications thereof, presented a multitude of complex legal problems to be answered by Mr. Schantz on a moment's notice. He needed to know the possible consequences of his ultimate decision. For example, the State contends that his refusal is admissible against him. Admitting, only for the sake of argument, that this is true, the law requires that he be warned of such a penalty. *Miranda v. Arizona*, *supra*; *People v. Ellis*, 65 Cal. 2d 529, 421 P.2d 393, 55 Cal. Rptr. 385 (1966). The State contends that any statements given to the examiner during the course of an examination could be used against him both upon the issues of guilt and of sanity. Again, admitting for the sake of argument that this is true, he should have known of this potential penalty. Several cases have indicated that a criminal defendant has the right to have his own psychiatrist present during a psychiatric examination. See *United States v. Albright*, *supra*, and *State v. Whitlow*, *supra*. This fact should have been known to Mr. Schantz before he decided whether to submit to an examination then, later, or not at all. Other cases have held that a criminal defendant has the right to have an attorney present during the psychiatric examination. See *In re Spencer*, *supra*, and *United States v. Albright*, *supra*. This fact would clearly have been of importance to Mr. Schantz in deciding whether and when to submit to examination. As noted earlier in this brief, many cases have held that a defendant's refusal to undergo various tests, whether or not he has a constitutional right to refuse, cannot be admitted into evidence nor argued by the prosecution. See *e.g.*, *Griffin v. California*,

supra, and *People v. Sweeney, supra*. Knowledge of this fact would be of great importance to a defendant in deciding whether or not to submit to psychiatric examination.

In short, then, Mr. Schantz was asked to make a decision with complicated legal consequences upon a moment's notice and without the necessary knowledge or advice. He could not be expected to know the ramifications of the request made by the State's psychiatrist. To admit into evidence his refusal, made in the absence of counsel, and under circumstances where the advice of counsel not only would have better prepared him to make the decision, but would have assisted counsel in preparing for trial, clearly violated his constitutional right to assistance of counsel guaranteed by the sixth amendment to the Constitution of the United States.

VI. The Trial Judge Should Have Held a Hearing Outside of the Presence of the Jury to Determine the Admissibility of Mr. Schantz' Refusal to Submit to Psychiatric Examination.

In *Jackson v. Denno*, 378 U.S. 368, 84 S. Ct. 1774, 12 L. Ed. 2d 908 (1964), the Supreme Court reversed a conviction which had been based in part on a confession which the defendant claimed was given involuntarily. The court in that case held that "fundamental fairness" required that no confession by the defendant be admitted until a hearing was held out of the presence of the jury to determine whether that confession was given freely and voluntarily. The rationale behind that decision was that there are many reasons aside from the defendant's guilt which can cause him to confess, and that to enter the confession without first determining the reason behind its making violates the defendant's right to a fair trial.

The same reasoning applies here. There can be many reasons why Mr. Schantz refused to speak to Dr. Bindelglas. He did not know Dr. Bindelglas. Dr. Bindelglas surprised

him. He may have felt that his attorney would not want him to talk to anyone without the attorney's approval. He may simply have had something else to do that day. And he may very well have been frightened by the sudden appearance of a State official at his home without notice to him or his attorney.

The requirement for a hearing has been applied in a number of situations other than to determine the admissibility of a confession. See *e.g.*, *People v. Smiley*, 54 Misc. 2d 826, 284 N.Y.S.2d 265 (1967) (admissibility of lineup identification), *People v. DuBois*, 31 Misc. 2d 157, 21 N.Y.S.2d 21 (1961), *cf.*, *Banks v. Peppersack*, 244 F. Supp. 675 (D.C. Md. 1965) (admissibility of evidence obtained by search and seizure).

As noted earlier in this brief, the State has admitted that the Bindelglas testimony is weak evidence that the defense of insanity was made in bad faith. There are equally strong inferences flowing from the Bindelglas testimony which do not lead to that conclusion. As such, at a minimum, the trial judge should have held a hearing to determine the motives behind Mr. Schantz' refusal to be examined. His failure to do so constitutes fundamental error of constitutional proportions. *Roberts v. United States*, 384 U.S. 18, 88 S. Ct. 1, 19 L. Ed. 2d 18 (1967).

VII. The State Has Failed to Carry the Burden of Proof That the Admission of the Bindelglas Testimony and the Prosecutor's Comment Thereon Was Harmless Error.

In *Chapman v. California*, 386 U.S. 18, 87 S. Ct. 824, 17 L. Ed. 2d 705 (1967) the Supreme Court held that a judgment must be reversed if based upon constitutional error unless the prosecution can show beyond a reasonable doubt that the constitutional error was not prejudicial to the defendant. In this case the State has made no showing and has offered no evidence that the errors assigned herein were

harmless. On the contrary the State has indicated that the probative value of the evidence was weak, and yet seeks to justify extensive argument based upon that evidence which could have had no effect but to mislead and to prejudice the jury concerning the defense of insanity. The record is clear that there was no evidence produced by the State at the trial concerning Mr. Schantz' sanity other than the testimony of Dr. Bindelglas, while the appellee presented extensive medical evidence to establish his lack of sanity. Since the jury determined that Mr. Schantz was sane at the time of the alleged offense, it is patently obvious that the jury was persuaded to some extent by the Bindelglas testimony and the prosecutor's argument thereon. If the admission of that testimony or the prosecutor's argument was error, it was prejudicial error.

The State has cited *Wilson v. Anderson*, 379 F.2d 331 (9th Cir. 1967) as indicative of the spirit in which the harmless error rule is to be applied. That case was recently reversed by the United States Supreme Court, *Anderson v. Nelson*, U.S., 88 S. Ct. 1138, L. Ed. 2d (1968), the Court holding that the prosecution had failed to carry its burden of proving beyond a reasonable doubt that constitutional error did not contribute to the defendant's conviction. See also *Fontaine v. California*, U.S., 88 S. Ct. 1229, L. Ed. 2d (1968).

On the record before this Court it is impossible to find, beyond a reasonable doubt, that the evidence of Mr. Schantz' refusal to be examined and the prosecutor's comments on that evidence were not prejudicial, and did not contribute to Mr. Schantz' conviction. For that reason, should the Court determine that constitutional error was committed, either in the introduction of the testimony or in the prosecutor's comments thereon, that error requires that Mr. Schantz be awarded a new trial.

CONCLUSION

The issues presented on this appeal are much more narrow than argued in the State's opening brief. The Court need not decide whether a criminal defendant can be forced to submit to a psychiatric examination, whether he need answer every question put to him at that examination, whether the prosecution may use as evidence the defendant's answers to questions during the examination, or whether the defendant is entitled to assistance of counsel during such an examination. The issue here is whether the State may introduce evidence that a criminal defendant has refused to submit to an examination, and may comment upon that evidence, where there was neither notice given of the proposed examination, nor authority for the examination, nor notice to or assistance of counsel in determining whether the examination was to be held. It is respectfully submitted that, although a holding that this procedure violated any one of the defendant's constitutional rights must result in an affirmation of the District Court's opinion, the procedure in fact violated the petitioner's right not to incriminate himself under the fifth amendment, his right to assistance of counsel under the sixth amendment, and his right to a fair trial under the due process clause of the fourteenth amendment. As such, the petitioner should be given a new trial.

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July, 1968

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with the rules.

JOHN J. FLYNN

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CHARLES A. DARDEN,

Appellant,

VS.

NO. 22765

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
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FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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FILED

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FOR THE NINTH CIRCUIT

CHARLES A. DARDEN,)
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)
 vs.)
)
 UNITED STATES OF AMERICA,)
)
 Appellee.)
)

NO. 22765

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the Southern District of California, adjudging appellant to be guilty as charged in both counts of a two-count indictment, at the conclusion of trial by jury [C. T. 2-3, 41].¹

The offenses occurred in the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Sections 2 and 3231, and Title 21, United States Code, Section

¹ "C. T. " refers to the Clerk's Transcript.

174. Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

II

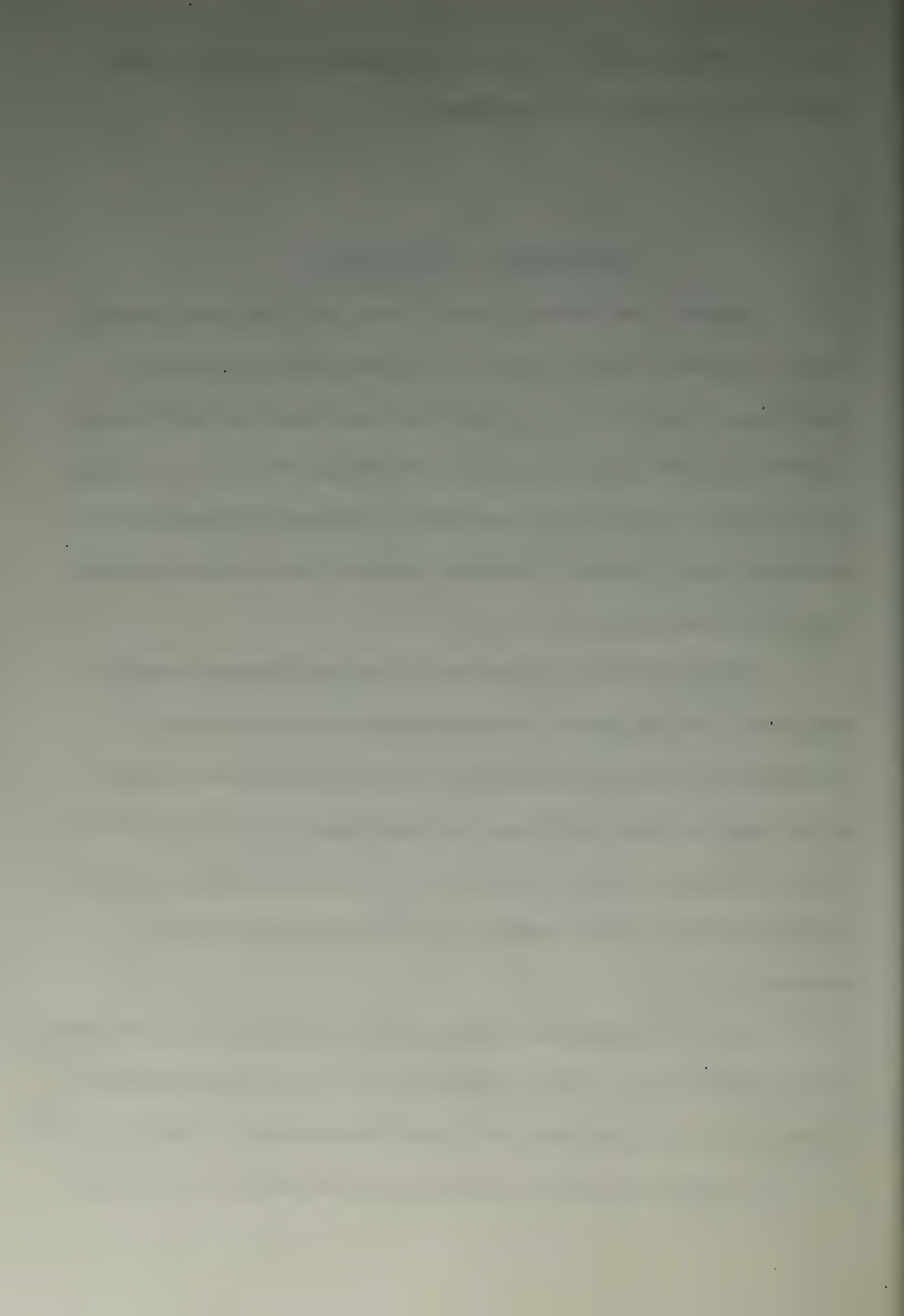
STATEMENT OF THE CASE

Appellant was charged in both counts of a two-count indictment returned by the Federal Grand Jury for the Southern District of California. The first count alleged that Sadie Mae Roberts knowingly imported and brought approximately two ounces of heroin, a narcotic drug, into the United States from Mexico, and that appellant Darden knowingly aided, abetted, counseled, induced, and procured the commission of that offense [C. T. 2].

The second count alleged that Sadie Mae Roberts knowingly concealed, and facilitated the transportation and concealment of, approximately two ounces of heroin, a narcotic drug, which heroin, as she then and there well knew, had been imported and brought into the United States contrary to law. It also was alleged that appellant Darden knowingly aided, abetted, etc., the commission of that offense [C T. 3].

Jury trial of appellant commenced on September 7, 1966, before United States District Judge Fred Kunzel [C. T. 33]. Appellant was found guilty as charged upon each count on September 8, 1966 [C. T. 39].

On October 10, 1966, appellant was sentenced to the custody



of the Attorney General for 5 years in addition to a fine of \$5,000, upon each count, to run concurrently, with payment of the fine upon the first count to constitute payment of the fine upon the second count [C. T. 41].

Appellant thereafter filed notice of appeal upon November 29, 1966 [C. T. 52].

III

ERROR SPECIFIED

Appellant specifies the following points upon appeal:

1. "The District Court erred in denying appellant's motion to suppress Sadie Mae Roberts' testimony against him and to suppress the tangible evidence admitted against him which has been seized as the result of an unlawful vaginal search of Sadie Mae Roberts."
2. "The District Court erred in ruling that Sadie Mae Roberts' testimony was not the product of influence and coercion and in permitting her to testify before the jury."
3. "The District Court erred in denying appellant's motion for acquittal."

[Appellant's brief, p. 7].

IV

STATEMENT OF THE FACTS

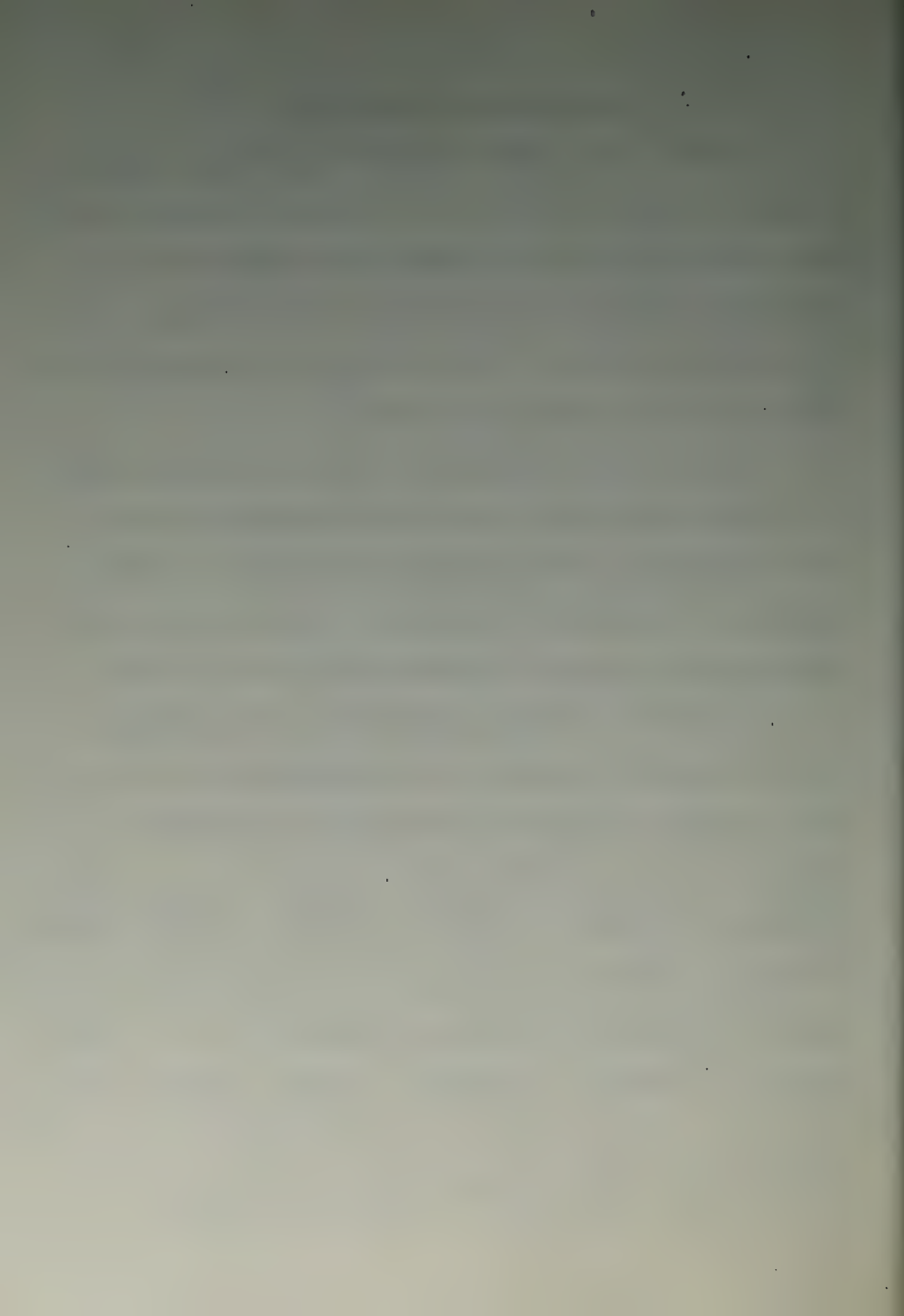
In 1964 or 1965 appellant told Sadie Roberts that he was going to Tijuana (Mexico), and wanted her to bring back some heroin. Miss Roberts went with appellant to Tijuana, and he gave heroin to her, which heroin she brought across the border in an automobile, accompanied by appellant. She returned the heroin to appellant on the American side of the border [R. T. 49-53]².

Miss Roberts made a number of trips to Tijuana with appellant and could not recall the exact number but believed that there were more than five trips. She brought back heroin upon each occasion. Appellant gave heroin to her in exchange for making the trips. She was not given any monetary compensation [R. T. 50-51, 53, 63].

Automobile rental agency records showed that appellant had rented vehicles from one agency on the following dates and times, with the mileage used by appellant and the rental fees as indicated:

<u>Date of Rental (All 1965)</u>	<u>Time Out</u>	<u>Time In</u>	<u>Total Time</u>	<u>Rental Cost</u>	<u>Total Mileage</u>
April 22	9:00 p. m.	-----	-----	-----	42
April 29	9:30 p. m.	Unknown	Unknown	-----	40
May 6	10:00 p. m.	11:00 p.m.	60 min.	-----	39

² "R. T. " refers to the Reporter's Transcript on Appeal.



<u>Date of Rental (All 1965)</u>	<u>Time Out</u>	<u>Time In</u>	<u>Total Time</u>	<u>Rental Cost</u>	<u>Total Mileage</u>
May 13	9:30 p. m.	10:15 p. m.	45 min.	\$12. 68	40
May 20	9:30 p. m.	Unknown	Unknown	-----	40
May 27	9:30 p. m.	11:00 p. m.	-----	\$12. 60	39
June 3	9:30 p. m.	2:20 p. m. June 4	About 17 hours	-----	50
June 19	8 or 9:00 p. m.	10:00 p. m.	60 or 120 <u>minutes</u>	-----	42
July 8	8:15 p. m.	-----	-----	-----	--

[R. T. 99-101, 103, 112-118, 122-125].

The round-trip distance from the San Diego Airport to downtown Tijuana was approximately 36 miles. Appellant testified that the July 8 rental occurred at the International Airport in San Diego [R. T. 90-91, 110]. The witness from the car rental agency testified that she personally handled two or three of the above-described rentals to appellant prior to the July 8 rental, which she also took care of, and that Miss Roberts was present on almost every occasion prior to July 8 [R. T. 119-120].

On the July 8 occasion, the witness, Miss Berckhemer, asked appellant where his friend was, and he said that she was sick. Appellant testified that Miss Roberts actually was at the International Airport at that time and had separated so that she could park his 1965 Cadillac [R. T. 91, 106, 118-119].

The July 8 trip had commenced in Los Angeles. After appellant and Miss Roberts traveled from Los Angeles to Tijuana, appellant left Miss Roberts in a vehicle, returned in about five minutes, and gave her a quantity of heroin. They went to a service station, where Miss Roberts went to the restroom and put the heroin inside of her vagina. Then they crossed the international border with appellant driving [R. T. 49, 53-57].

The entry into the United States occurred at San Ysidro, California. No merchandise was declared [R. T. 56, 139]. Appellant was "nervous or uncertain." The Customs inspector on duty asked appellant what he was doing in Mexico, and he replied that he was "just looking around." He said that he lived in San Diego, but his driver's license showed that he lived in Los Angeles. He said that the vehicle belonged to him [R. T. 139, 141].

Miss Roberts was taken to a physician, who removed approximately two ounces of heroin from her body. This was the same heroin that appellant had given to Miss Roberts [R. T. 55, 57, 65-66, 68-69].

Miss Roberts testified that she could not recall what she had said to Customs officials but that she believed that she told them that appellant was not involved in the proceeding. Appellant posted \$10,000 bail for Miss Roberts [R. T. 42, 64].

Appellant testified and claimed innocence. He testified that he was living with Miss Roberts at the time of the arrest; that he had

been to Mexico with her several times; that he was not aware that she was using heroin; that he gave the rental agency a false address when he rented the vehicle on July 8 at the International Airport in San Diego; that he gave the same false address to the officers when arrested on July 8; and that he gave the same false address to the United States Commissioner three days later [R. T. 81-83, 86-87, 105].

Appellant also testified that he rented vehicles in San Diego on various occasions in April, May, June, and July, 1965; that he lived in Los Angeles; that he was a cook; and that on May 13, 1965, he rented a vehicle, kept it for 45 minutes, during which time he visited some people keeping his children in San Diego, then went to visit a friend of his mother's, then went to visit a Mrs. Rodriguez, and did not leave San Diego, incurring a rental fee of \$12.68 [R. T. 82-83, 85, 97-102]. (The vehicle went a distance of 40 miles during the 45-minute period, R. T. 116-117).

Appellant testified that on May 27, 1965, he rented a vehicle and kept it for about 90 minutes, during which time he remained in San Diego, visited his aunt at 41st and Market, visited his children on Kurtz Street, then went to Imperial Avenue and spent some time there, then went downtown to "the Cross Roads" and spent "quite a bit of time" there, and then returned to the airport, incurring a rental fee of \$12.60 [R. T. 102-105]. (The vehicle went a distance of 39 miles during the 90-minute period, R. T. 117).

Appellant also testified that on July 8, he drove a vehicle from Los Angeles to San Diego; rented another vehicle at the International Airport in San Diego; went shopping with Sadie Roberts in Tijuana and visited some bars; and separated from her at several bars, where he assumed that she was going to the ladies' room, and also separated at stores, although not sufficiently separated to lose contact with each other [R. T. 83, 88-89].

In testimony partially occurring outside of the presence of the jury, three witnesses testified that Miss Roberts received no promise of a lesser charge in order to induce her to testify [R. T. 37, 44, 62, 76]. There was no evidence to the contrary. The trial judge stated:

"I will find that there is no question about the voluntariness of the defendant's defendant Roberts testimony. I don't think there is any evidence that she was coerced or that she was promised any benefit of any kind for testifying." [R. T. 47]

The case of Miss Roberts was set for disposition in October, 1966, and a new prosecuting attorney would be in charge of the office when the October date arrived [R. T. 30-31].

ARGUMENTA. THE QUESTION OF ALLEGED UNLAWFUL
SEARCH OR SEIZURE CANNOT BE RAISED,
FOR THE FIRST TIME, UPON APPEAL.

Appellant contends that the narcotics seized from a body cavity of another person should have been suppressed at his trial and that "the District Court's denial of his motion for suppression was clearly wrong." (Appellant's Brief, p. 21)

However, the "denial" of the "motion" was not erroneous, as there was no motion. Appellant did not move to suppress the narcotics.

Where a motion to suppress evidence is not made in the trial court, the motion cannot be made, for the first time, upon appeal.

Barba-Reyes v. United States, 387 F. 2d 91, 93 (9th Cir. 1967);

Billeci v. United States, 290 F. 2d 628, 629 (9th Cir. 1961);

Stein v. United States, 166 F. 2d 851, 855 (9th Cir. 1948).

While it might be argued that the question may be raised under the "plain errors" doctrine of Rule 52(b) of the Federal Rules of Criminal Procedure, it has been held that the "plain errors" rule does not apply to search and seizure questions.

Billeci, supra, at p. 629.³

³ While there may be a lack of unanimity of authority upon this point, it is respectfully submitted that the logical foundation of the decision in Billeci points the way to the correct result.

B. ASSUMING, ARGUENDO, THAT APPELLANT MAY RAISE AN ISSUE NOT RAISED IN THE TRIAL COURT, HE HAS NO STANDING TO OBJECT TO SEARCH OF ANOTHER PERSON'S BODY CAVITY.

Assuming, for purposes of argument only, that appellant may raise an issue that was not raised in the trial court, he has no standing to object to an alleged violation of the Constitutional rights of someone else.

Wong Sun v. United States, 371 U.S. 471, 492 (1963);

Diaz-Rosendo v. United States, 357 F.2d 124, 130-34 (9th Cir. 1966);

Armada v. United States, 319 F.2d 793, 796 (5th Cir. 1963).

Appellant contends that the requirement of standing to object has been eliminated by the Supreme Court decision in Linkletter v. Walker, 381 U.S. 618 (1965). However, Linkletter was not concerned with the elimination of the Fourth Amendment standing requirement, which would have the inevitable result of placing the Fourth Amendment upon a pedestal above all other amendments and articles of the United States Constitution. On the contrary, the Fourth Amendment standing requirement is very much alive:

"However, we have also held that rights assured by the Fourth Amendment are personal rights, and that they may be enforced by exclusion of evidence only at

the instance of one whose own protection was infringed by the search and seizure. "

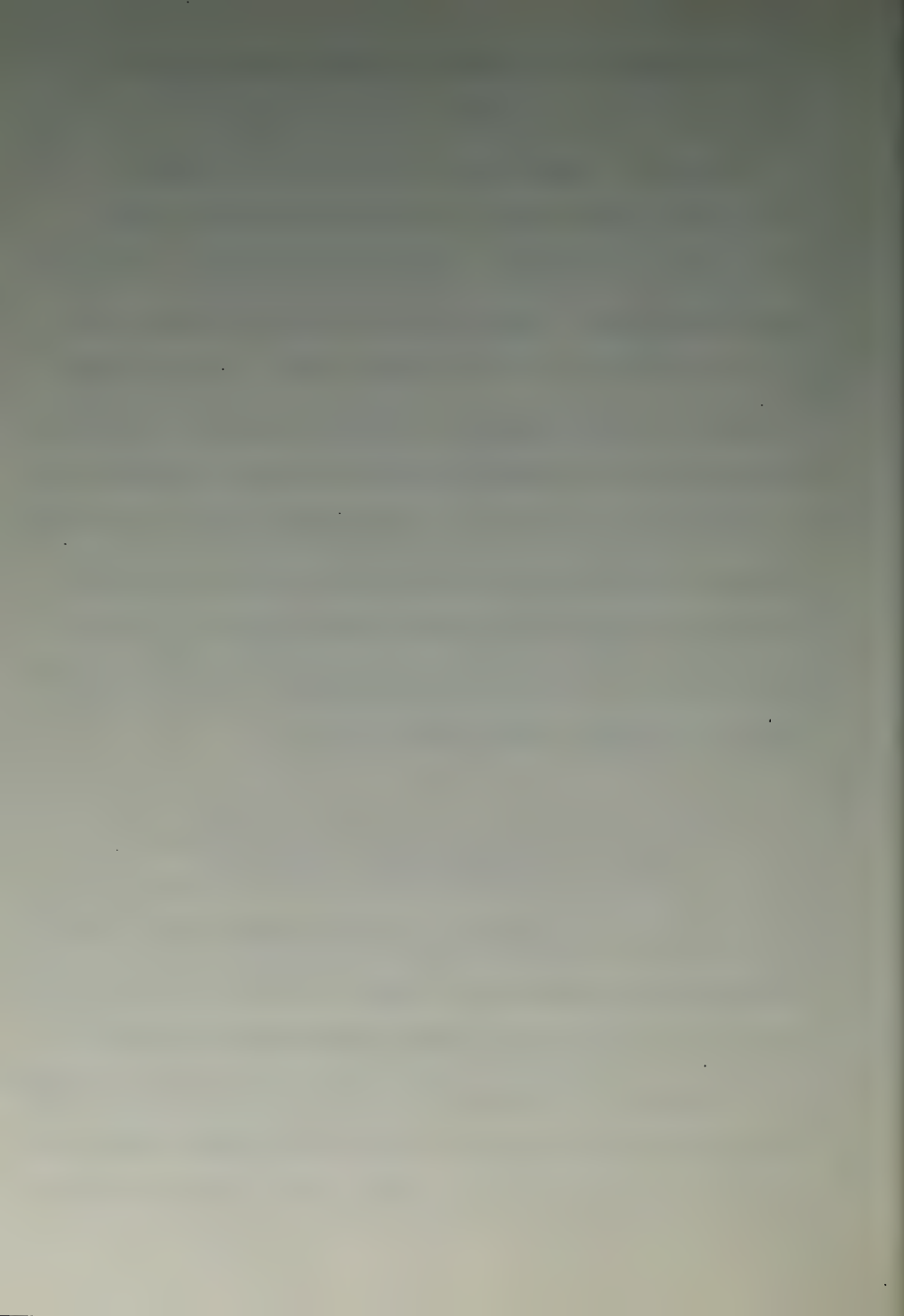
Simmons v. United States, 390 U. S. 377, 389 (1968).

Appellant argues that the evidence was the "fruit of the poisonous tree" and should be excluded. If the evidence was offered against Sadie Roberts, it would be the "fruit of the poisonous tree," if it be assumed that the lack of evidence upon an unlitigated "issue" can justify a conclusion that the search was unreasonable. However, the evidence was not offered against Miss Roberts. An extension of the "fruit of the poisonous tree" doctrine to appellant Darden, who has no standing, would simply mean an end to the standing requirement. The cases do not support this radical change in the law, with the possible exception of California state cases which cannot overrule the decisions of the United States Supreme Court.

C. THE TESTIMONY OF SADIE ROBERTS WAS PROPERLY RECEIVED IN EVIDENCE.

Appellant asserts that the testimony of Sadie Roberts should have been suppressed because it allegedly resulted from "the government's promise" of favorable action. (Appellant's Brief, pp. 21-22)

Since there is not any evidence whatsoever to support appellant's claim that there was a promise, appellant relies upon imagination and speculation in an attempt to fill the void. Three witnesses testified



that Miss Roberts received no promises of a lesser charge in order to induce her to testify [R. T. 37, 44, 62, 76]. There was no evidence of any promise. The trial Judge stated:

"I will find that there is no question about the voluntariness of the defendant's (defendant Roberts) testimony.

I don't think there is any evidence that she was coerced or that she was promised any benefit of any kind for testifying." [R. T. 47]

If Miss Roberts hoped for some benefit as a result of her testimony, there would be nothing improper in this.

Minkin v. United States, 383 F. 2d 427, 428 (9th Cir. 1967);

Diaz-Rosendo, supra, 357 F. 2d 124, 130 (9th Cir. 1966);

United States v. Marchese, 341 F. 2d 782, 799 (9th Cir. 1965), cert. denied, 382 U. S. 817 (1965);

Audett v. United States, 265 F. 2d 837, 847 (9th Cir. 1959), cert. denied, 361 U. S. 815 (1959).

Cooperation with hope of benefit "is as old as law itself" (Marchese, supra, Judge Barnes speaking for the Court).

"This still seems to be one tool left to a prosecutor."

(Minkin, supra)

**D. DENIAL OF THE MOTION FOR JUDGMENT
OF ACQUITTAL DID NOT CONSTITUTE ERROR.**

Appellant maintains that the motion for judgment of acquittal should have been granted upon the grounds answered under "A", "B", and "C", above. (Appellant's brief incorrectly suggests that the motion to suppress physical evidence was included in the motion for judgment of acquittal, Appellant's Brief, p. 24. It was not, R. T. 130-31).

Appellant also suggests that the evidence was insufficient. He contends that there was an inconsistency, because Miss Roberts testified that she did not remember what she told the Customs officers [R. T. 42, 58], and also testified that she thought that she told them that Darden was not involved in the proceeding [R. T. 42]. It is certainly questionable whether this is an inconsistency or simply an exercise in semantics. At any rate, the testimony of Miss Roberts was supported and corroborated by other evidence in the case, including the numerous rentals of vehicles by appellant, the pattern of the rentals [R. T. 99-101, 103, 112-118, 122-125], the presence of Miss Roberts at the time of the rentals [R. T. 119-120], appellant's false statements to the effect that Miss Roberts was sick when she actually was parking his 1965 Cadillac [R. T. 91, 106, 118-19], appellant's nervousness or uncertainty when he crossed the border with Miss Roberts at the time of the crime [R. T. 139, 141], appellant's false statements when he crossed the

border [R. T. 139, 141], the false address given by appellant on July 8 and July 11 [R. T. 81-83, 86-87, 105], and appellant's incredible testimony regarding the May 13 and May 27 rentals [R. T. 82-85, 97-105, 116-117].

Even though corroboration of the testimony of Miss Roberts was not required, the evidence was clearly sufficient to justify the unanimous verdict of the twelve jurors. Although there was ample corroboration here, a conviction may be based upon the uncorroborated testimony of an accomplice, even though the accomplice is in a position to gain favors and even though there are inconsistencies in the testimony.

Lyda v. United States, 321 F.2d 788, 794 (9th Cir. 1963).

VI

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the Court below should be affirmed.

Respectfully submitted,

EDWIN L. MILLER, JR.
United States Attorney

PHILLIP W. JOHNSON
Assistant U. S. Attorney

Attorneys for Appellee,
United States of America

CIVIL NO. /

2 2 7 6 6

MAY 10 1968

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOLOMISSEY JESSY,

Appellant,

vs.

THE SUPERIOR COURT OF THE STATE OF
CALIFORNIA, AND THE COUNTY OF LOS
ANGELES,

Appellees

Robert Court
Appeal from the United States Court of Appeals
For the Central District of California
The Hon. E. AVERY CARY, Judge Presiding

APPELLANT'S OPENING BRIEF

SOLOMISSEY JESSY
1967-1/2 South Raymond Avenue
Los Angeles, California 90007

Appellant in Propria Persona

FILED

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2766

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APPELLANT'S OPENING BRIEF

TO THE HONORABLE JUDGES OF THE ABOVE ENTITLED COURT:

JURISDICTION

This is an appeal from an order of the United States Court of Appeals, Central District of California, The Honorable E. AVERY CRARY, Judge presiding, being action number 67-1445 E. C., dismissing the Complaint for lack of a stated cause of action and under the statute of limitations. Jurisdiction is invoked under Title 28, Section 1291 U. S. C.

STATEMENT OF THE CASE

The complaint dismissed was a complaint for damage for fraud, commenced by the Appellant's arrest on January 26, 1944, charging Appellant with disturbing the peace, later jailed without any questions in regard to the beating.

Three of the police officers were Clinton Anderson (now Chief of Police of the City of Beverly Hills), Mr. Richey and Mr. Jones. There were others with them when the arrest was made. There was a jury trial. The Beverly Hills Police witnessed what caused serious injuries. Appellant was later jailed on said charges.

There followed a complaint for assault and battery filed May 31, 1944, Case No. C-493,681, Superior Court of the State of California entitled "Solomissey Jessy, Plaintiff, vs. Maggie George, et al., Defendants". The action was tried and dismissed, giving the defendants judgment against the plaintiff, Solomissey Jessy, In Propria Persona, without any notice or legal document in regards to the court procedure concerning Civil No. C-493,681.

Relatively the appellees have in their files and records appellant's arrest on January 26, 1944, at 615 North Oakhurst Drive, Beverly Hills, California, which is the source of this case.

Appellant was arrested and later taken to jail with-

out any questions about the beating. Three of the Police Officers were Clinton Anderson (now Chief of Police of the City of Beverly Hills), Mr. Richey and Mr. Jones. There were others with them when the arrest was made. There was a jury trial.

Action to cover damages for injuries sustained by the beating, the appellant had a complaint filed on May 31, 1944. Later, doing the work in propria persona. Fearful of being prosecuted themselves by the appellant's plans to take Case No. C-493,681 to a higher court, the appellees violated appellant's civil rights and deprived her of her liberty, freedom of speech and her Constitutional rights.

The first is that the appellees suppressed evidence in this case, and that such suppression constituted a denial of due process.

It is unthinkable under the United States systems of law, a judgment at the disposal of the said trial court, where improper standards in determining their decision was used to grant the defendants a judgment against the plaintiff.

The appellees denied the appeal equal rights to answer any of the documents or to be heard, and their contentions are without merit.

Evidence showing, among other things, that a counter check was O.K.'d by Mrs. Amador, in October 1957. Appellant decided that \$60.00 would do, believing that more money could

drawn in the same manner. Where the money came from, and how Mrs. Amador got her information in regard to the same, has never been answered so far.

On February 4, 1966, appellant discovered fraud in case No. C-493,681. After the same was reviewed, it is plaintiff's belief that there is such evidence. The case was reported to the United States Department of Justice. Appellant later was informed that all inquiry is done by the Federal Bureau of Investigation, and reported the same to the officers and agents.

Substantial evidence that false statements are sworn to and sent to the appellant by the attorneys for the appellees is another thing that the appellant asked the Federal Bureau of Investigation to look into, as well as seeking information herself.

These proceedings arose out of a civil action and for reasons set forth appellant holds that the said trial court erred in denying the plaintiff's right to relief.

POINT I

The hearing before the United States District Court, Central District of California, before the Honorable E. Avery Crary, Judge presiding, was held on November 13, 1967, and Judge Crary dismissed the matter without prejudice due to the fact that a cause of action was not shown or stated to the

point according to the Federal Rules of Civil Procedure.

POINT II

Refusal during a hearing to give reasons for statements in a document sent to the appellant in November, 1967, after the appellant asked the Honorable E. Avery Crary, Judge, what did the attorneys for the defendants mean in regard to the criminal actions? No definite answer was given.

POINT III

In spite of the fact that the appellees involved a lot of people trying to stop the appellant from turning this case over to the United States Government, appellant assumes that the time and efforts spent in bringing this case to the United States Government have not been in vain.

There are many ways and means that the United States Government uses through its offices and agents that the average American citizen is not familiar with or aware of.

Appellant's discovery of Special Trials, and attorneys for Special Trials in August, 1967, where Special Agents and United States Attorneys hold conferences that are strictly confidential. There are Special Agents for fraud cases, and it might be well to say that each and every one of them work directly out of Washington, D. C. as well as other agencies, office staffs and certain divisions of the United States Government, including the Department of Justice.

In reality the United States Government is taking action. In some instances there are private cases where secrecy is necessary and the documents and exhibits are not placed in courtrooms that are open to the public.

Appellant's request for inquiring through United States Government offices and agents is recognized in this case.

Appellant believes that the United States Government has taken action in this case, and the same will prove that there are some things that the United States Government will not tolerate, including what the appellees' files and records show in this case.

POINT IV

The second hearing was heard on January 2, 1968, in the United States District Court, Central District of California, before the Honorable E. Avery Crary, Judge. Motion and Notice of Motion for Reconsideration by the Court of Order Dismissing and for an Order with leave to appellant to amend the complaint.

The third hearing was in the same court and before the said Honorable E. Avery Crary, Judge, on January 29, 1968. At each hearing appellant appeared in propria persona. Judgment of Dismissal of the First Amended Complaint was entered.

Appellant, noticing the change in the Conclusions of Law, the attorneys for the appellees state that criminal prosecution occurred in 1944, yet not giving the time, the place, the date or name of the crime. Appellant immediately took the matter up with the Federal Bureau of Investigation, giving the names of the four attorneys, Harold W. Kennedy, Donald K. Byrne, John Maharg, and Jean L. Webster, and appellant is working also. On February 6, 1968, five letters were sent out to the Criminal Division of the Municipal Court asking the truth about the same since this is the second time this statement has been sent to the appellant. The first time was November, 1967, and after care and consideration, appellant asked the court, by filing a "Motion and Notice of Motion for consideration by the Court of Order Dismissing and For an order with Leave to Plaintiff to Amend the Complaint", due to the fact that appellant's Notice of Appeal was filed on November 16, 1967.

The last document that states the year 1944. Appellant was imprisoned as a result of the crime without any other information concerning the time, date and place.

Appellant decided that it was a matter that the Federal Bureau of Investigation should have, and the names of the four attorneys for the defendants.

Are these facts and statements to be hidden? If so, why? As appellant in this case, I feel that in determining whether the statement is false or true is a matter that should

be cleared up before this case is finally settled and closed.

If there are any steps that I should take before the hearing, I would like to know.

"Fraud representation" means false statements made with intent to deceive, and which actually produce such results.

Montgomery S. Ry. Co. v. Matthew,

77 Ala. 357, 364; 54 Am Rep 60

"An allegation in an accusation for being a common cheat and swindler, is a sufficient statement that such representations were made with intent to defraud".

Crawford v. State,

62 S. E. 501, 504, 4 Ga. App. 789

The appellees have no regard for concerning the importance of presenting Constitutional rights, or various rules for guidance of the trial judges.

With a violation of unlawful or fraudulent intents, knowing that Case C-493,681 had been improperly handled.

I think that their own records show substantial evidence establishing the guilt of the appellees.

Is it not true that if a scheme is devised with the intent to practice fraud, and the appellees used their courts, offices and agents in executing the scheme, that

fact that there is no misrepresentation of a single existing fact is immaterial? This was a scheme reasonably calculated to deceive. The court's decision was used in the execution of the scheme.

All of these circumstances, and particularly the detailed account of the appellees' files from time to time between 1944-1959, the United States Government can prove beyond a reasonable doubt that the appellees committed fraud in Case No. C-493,681.

They determined and so ordered the judgment against the plaintiff be given to the defendant.

It does not appear that the plaintiff was present, or even any information of the court proceedings given to her at any time.

The appellees actually committed theft, in a secret manner, and the money from the judgment was stolen and taken away without right.

The furtive manner that the appellees used in the final settlement of Case No. C-493,681 is not known to the appellant. However, where contention that the plaintiff was denied her Constitutional rights because she was not present, civil rights denied, as well as other ways and means that the case was improperly handled, the contention could be the basis for relief. The pertinent facts are many and any dispute can be settled if the Court required proof of the same

rough records either stored or open to the public,

As appellant in the case, I would like to ask the Court to look at the records on file in the Court and offices of the appellees. The same will show bad law enforcement, delays, and the grounds that the arguments raised opposition to the Complaint, Amended Complaint, and other documents filed by the appellant were without merit. False statement using the Statute of Limitations that they deliberately and maliciously planned to use as an alibi to hide and conceal.

The appellees wilfully conducted illegal proceedings withdraw from sight everything that could possibly be used to take legal action against them. Their idea was to hide the truth.

This case has merit, however. As the appellant in the same, there are legal documents that I wrote and filed, willing to give in detail the pertinent facts, stating a cause of action and showing a cause of action.

Therefore, I do not believe that certain words and phrases are sufficient to prevent justice in this case.

If it is possible to file a Motion for remand of Case No. 67-1445-E.C. to be removed and strictly handled by the United States Government, giving its offices and agents jurisdiction over the case, I would like to do so. It would be possible to bring in all of the true facts that the United States Government, its agents and offices have discovered since

I reported this case, as well, to the Associated Press in Manhattan, New York, that I wrote to in November, 1964.

As plaintiff in Case No. C-493,681 I took action against the defendants to enjoin them from getting away with dishonesty, and abuse. As appellant in Case No. 67-1445-E.C., I took action in the United States District Court against the appellees, to enjoin them from getting away with the fraud they committed, improper handling of Case No. C-493,681, and all other statements and facts filed in my Complaint, Amended Complaint, Notices, Motions and Appeals filed in the United States District Court and the United States Court of Appeals.

Apart from its relationship of the seized judgment the purported dismissal was inadmissible because the document did not state a cause of action or show cause of action.

Even if the false statements had been admissible under the constitutional principles discussed above, it would still be required that it be excluded as the hidden evidence is insufficient as a matter of law. To sustain the conviction of the plaintiff the hidden evidence is totally lacking on the question of whether any offense was committed. The date, time, place, arresting agent is not listed.

The record discloses a clear failure of proof of

venue. (Appellant's Research).

In the criminal actions in 1944 the prosecution, if any, was requested in the absence of the appellant, who had no knowledge of the proceedings to prove venue in accordance with the allegations of the indictment and its failure to do so constitutes a fatal defect.

If the prosecution failed to bear its burden on this issue, the order, activities and false statements are insufficient and under the circumstances of the case worked reversible prejudice and damage on the appellant.

The record discloses a clear failure of proof of venue (Appellant's Research).

Specifically, as the appellant in this case, I firmly believe that there is a total failure of proof sufficient to sustain a conviction. However, as to the appellant Solomissey Jessy, in propria persona, specifically, the prosecution failed, among other things. Therefore, I believe that the Federal Bureau of Investigation and the Associated Press in Manhattan, New York, have an answer.

POINT V

Action to procure a judgment on the grounds of fraud. Appellant's action commenced within two years after learning of alleged fraud in obtaining execution of a judgment, that was awarded to the defendants. The appellees, ordered the

judgment because of fraud despite allegations and proof that the appellant was not or could not be present, knowing that no information was or would be given that she might in some way defend herself or answer any questions in regard to the dismissal and judgment.

This cause of action to procure a judgment on the ground of fraud refers to an "action to procure a judgment on the ground of fraud" this type of action is one akin to the common law action for deceit with the idea to conceal constitutes a "fraudulent misrepresentation" and without a doubt misrepresentation was the basis of appellees' action.

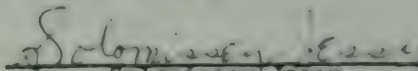
There is one organization that does not appear in any of the documents filed by the appellant, or mentioned in the Court Reporter's Transcript, or Minutes, prior to the Notice of Appeal filed on February 5, 1968, the Honorable Judge E. C. Crary's suggestion on January 20, 1968, followed by the Appellant's visit to the office on the above date, followed by a letter giving more of the facts and details concerning the case, yet not able to go into the office for an interview due to unavoidable circumstances, it was impossible to make an appointment and keep the same. Working conditions were good at the time, however, it was necessary to make plans that could not require two or three days in advance, and research in the law library was the only step that would solve the problem of working on the case alone.

Many of the letters, and legal documents that have been sent to the President were sent in good faith because of the time, report, and interest shown by the President after sending a letter in regard to Federal employment. However, the fact that the office of Economic Opportunity is a part of the executive office of the President or rather a branch of that office is another office with agents working for the United States Government. Therefore, the Office of Economic Opportunity has its rights in this case. The letter that the appellant received from the Office of Economic Opportunity is one that represents the United States Government in some way, and to have the same affirm certain documents and the signature of the President in regards to this matter, the case could be settled and closed.

CONCLUSION

Appellant respectfully request this Honorable Court for its reversal of the Order Dismissing the Complaint and for such other and further relief as to the Court seems just and proper in the premises.


Respectfully submitted


Solomissey Jessy
Appellant, In Propria Persona

CERTIFICATE

SOLOMISSEY JESSY, in propria persona, certifies that, in connection with the preparation of this Brief, she has examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in her opinion, the foregoing brief is in full compliance with those rules.

Dated: May 2, 1968.


SOLOMISSEY JESSY,
Appellant, in Propria Persona

STATE OF CALIFORNIA }
COUNTY OF LOS ANGELES } ss.

AFFIDAVIT OF MAILING
(1013a C.C.P.)

SOLOMISSEY JESSY, appellant in propria persona, being first duly sworn, upon oath states:

I am a citizen of the United States and resident of the county aforesaid. I am over the age of eighteen years, and the appellant is propria persona in the within action; that on May 3, 1968, I served the within APPELLANT'S FENING BRIEF on the appellees in said action, by placing three copies thereof enclosed in a sealed envelope with postage thereon fully prepaid in the United States mail at Fifth and Spring Streets, Los Angeles, California, addressed as follows:

JOHN D. MAHARG, Esq.
County Counsel
County of Los Angeles
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012

J. Solomissey Jessy
Solomissey Jessy

Subscribed and sworn to before me this 3rd day of May, 1968

William Ashley
William Ashley, Notary Public
in the State of California
Principal County - Los Angeles

My Commission Expires: 9/3/70

COPY

NO. 22766

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOLOMISSEY JESSY,

APPELLANT,

VS.

THE SUPERIOR COURT OF CALIFORNIA

AND LOS ANGELES COUNTY,

APPELLEES.

APPELLEES' BRIEF

JOHN D. MAHARG, County Counsel
ROBERT R. TAYLOR,
Deputy County Counsel
648 Hall of Administration
Los Angeles, California 90012

625-3611, Ext. 65629

Attorneys for Appellees

FILED

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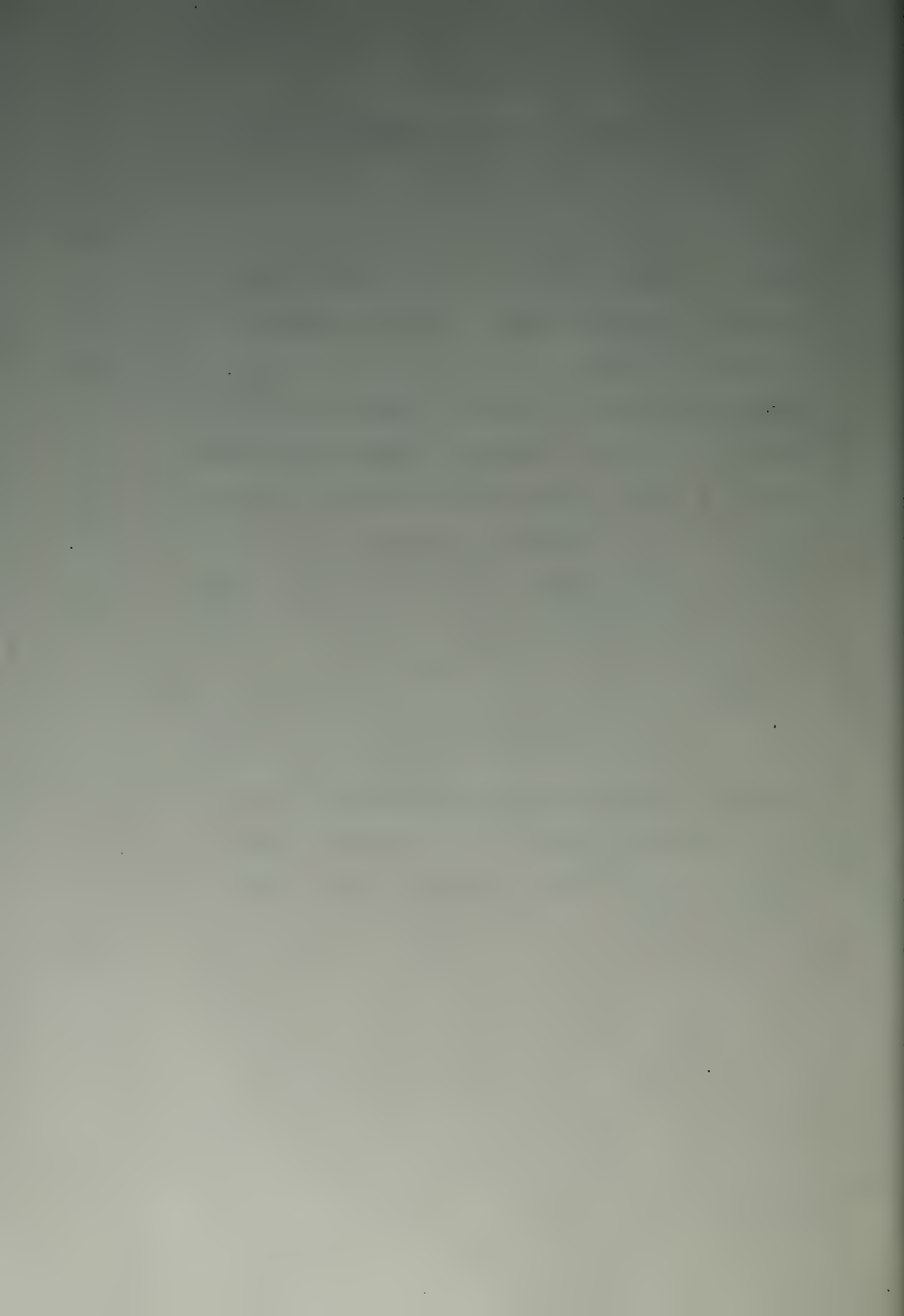
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IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOLOMITSEY JESSY,

Appellant,

vs.

THE SUPERIOR COURT OF
CALIFORNIA AND LOS ANGELES
COUNTY,

Appellees.

NO. 22766

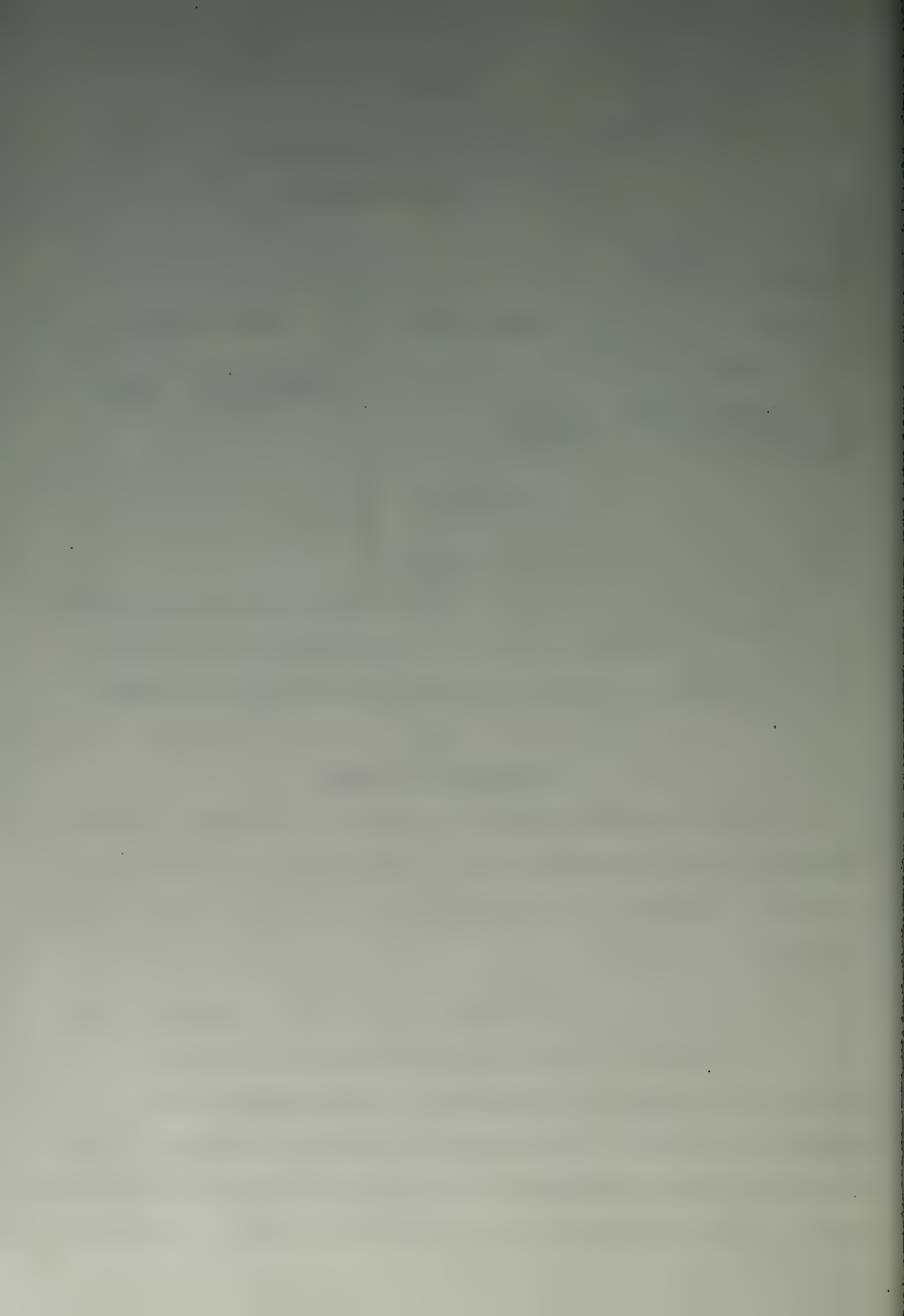
APPELLEES' BRIEF

COME NOW the appellees, THE SUPERIOR COURT OF THE STATE
OF CALIFORNIA FOR THE COUNTY OF LOS ANGELES and THE COUNTY
OF LOS ANGELES, and present herewith their brief on appeal:

STATEMENT OF CASE

Although appellant has a portion of her brief labeled
Statement of the Case (pp. 2-4), the appellees believe it is
necessary, for the purpose of clarity, to also submit a brief
statement of the case.

On October 2, 1967 the appellant filed a document with
the United States District Court, Central District of
California, labeled "Complaint for Damages for Fraud"
(page 2 of record). On November 1, 1967 the appellees, ap-
parently named as defendants in the above purported claim for
relief, filed a motion in that court to dismiss the document.



The court granted the Motion to Dismiss but allowed the appellant leave to amend her document (page 11 of record).

On January 2, 1968 the appellant filed a document with that same court entitled "Amended Complaint" (page 6 of record). On January 11, 1968 the appellees filed a Motion to Dismiss the "Amended Complaint" (page 13 of record). The court granted the Motion to Dismiss the First Amended Complaint (page 23 of record). In dismissing the First Amended Complaint the court found: that the plaintiff was a defendant in a criminal action pending in the Superior Court of the State of California for the County of Los Angeles in approximately July of 1959, but that the said action was dismissed; that the plaintiff was a defendant in a criminal action pending in the Superior Court of the State of California for the County of Los Angeles in the year 1944, and was prosecuted in that criminal action by the District Attorney of the County of Los Angeles; that the plaintiff was imprisoned as a result of the aforementioned criminal prosecution which occurred in the year 1944 (see page 20 of record).

This Judgment of Dismissal of the First Amended Complaint (page 23 of record) was appealed from by the appellant (page 25 of record). In all proceedings on record in the District Court the appellant elected to appear in propria persona.

The appellees respectfully submit the issue before this

/



court is whether the Judgment of Dismissal of the First Amended Complaint was properly granted.

ARGUMENT OF CASE

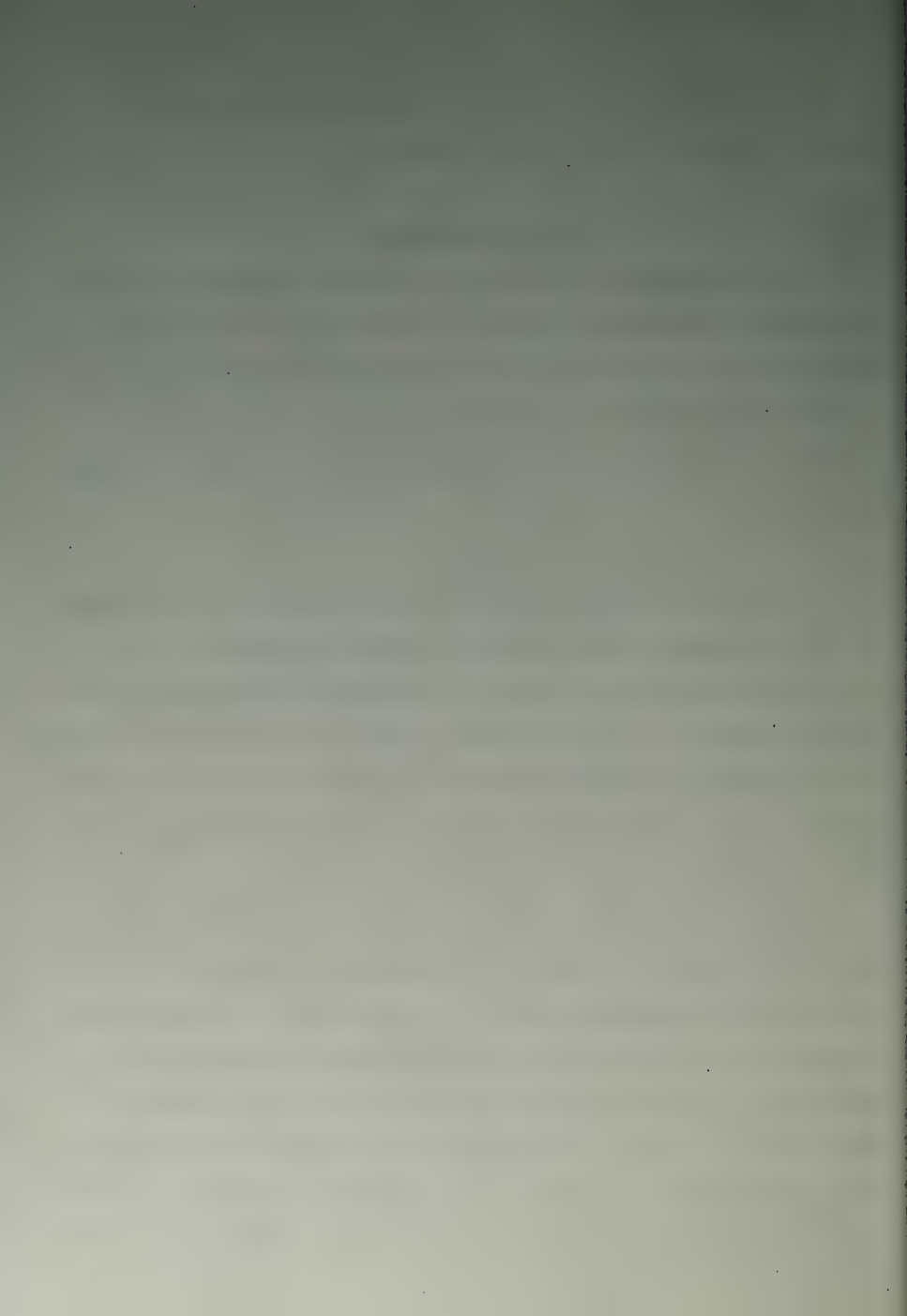
The Judgment of Dismissal of the First Amended Complaint entered by the District Court in favor of appellees was correct and proper in that the First Amended Complaint failed to state a claim upon which relief could be granted. The District Court's action should be sustained on either of the following grounds:

I

THE FIRST AMENDED COMPLAINT IS UNINTELLIGIBLE AND STATES NO RECOGNIZABLE CLAIM TO RELIEF AGAINST APPELLEES.

The appellees are unable to understand the import of the amended complaint. The document appears to consist of a series of arguments and conclusions all of which are unintelligible. Appellees are unable to extract any factual material from the First Amended Complaint in order to proceed.

As to the appellee, County of Los Angeles, the First Amended Complaint alleges that the District Attorney was involved in the imprisonment of the appellant. It also alleges that at certain times the Public Defender represented the appellant. The First Amended Complaint fails to allege in that manner, if any, the County of Los Angeles or its agents acted illegally in affecting the appellant's rights. Further, apparently the appellee and the appellees' agents were acting



in a judicial or quasi-judicial capacity in all of the intelligible events related by appellant and suit would not lie against them in any event. Harmon v. Superior Court (9th Cir. 1964) 329 F.2d 154.

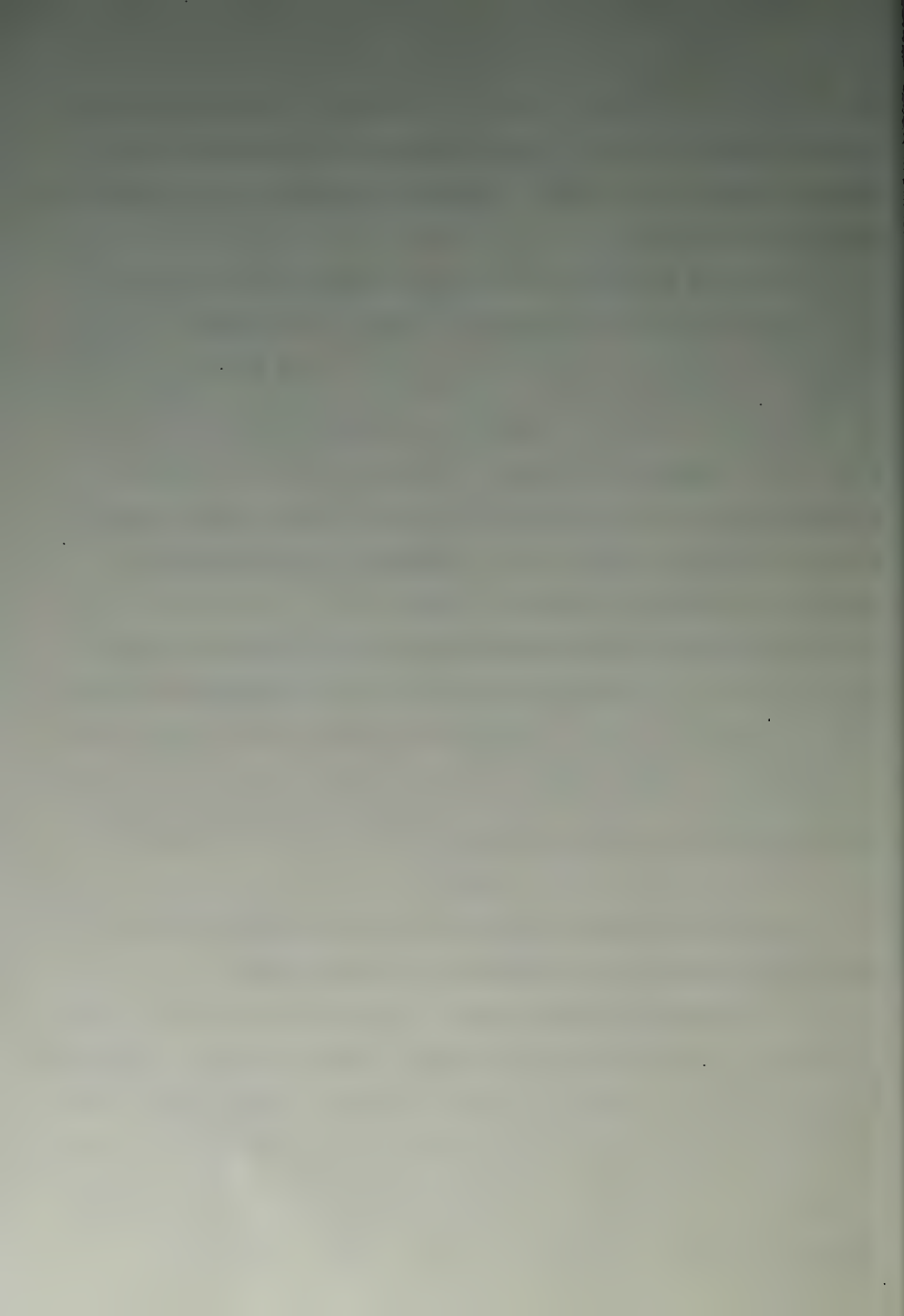
As to the appellee the Superior Court of the State of California for the County of Los Angeles, the court and its judges are immune to suits for damages for actions taken within their jurisdiction. Larson v. Gibson (9th Cir. 1959) 267 F.2d 386. Johnson v. MacCoy (9th Cir. 1960) 278 F.2d 37. Green v. Moody (9th Cir. 1964) 330 F.2d 868. Sires v. Cole (9th Cir. 1963) 320 F.2d 877. Harmon v. Superior Court (9th Cir. 1964) 329 F.2d 154, 155.

If appellant is attempting to state a claim to relief for fraud by her Amended Complaint then the appellees are unable to find any facts to support such a claim. Further, any circumstances constituting fraud must be particularly stated. Federal Rules of Civil Procedure, Rule 9(b), 28 U.S.C.A.

II

NO CLAIM TO RELIEF IS STATED BY THE AMENDED COMPLAINT IN THAT IT IS BARRED BY THE STATUTE OF LIMITATIONS.

The amended complaint shows that the last overt act that could have possibly been committed by the appellees would have been on July 20, 1959 (page 4 of "Amended Complaint"). Since well over eight years elapsed before the appellant filed her "complaint" in November of 1967, any action against the appellees would be barred by the applicable statute of

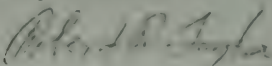


limitations. California Code of Civil Procedure, §338(1) provides that an action, other than for the recovery of real property, must be commenced within three years if there is an action upon a liability created by statute other than a penalty of forfeiture.

Assuming this is an action brought under the Civil Rights Act, 42 U.S.C.A. §§1983, 1985, it is settled law that in respect to any action brought on the ground of deprivation of Civil Rights in a Federal District Court having its situs in California, the statute of limitations is three years in that this limitation period commences to run in respect to any particular defendant from the date of the last overt act attributed to that defendant. Lambert v. Conrad (9th Cir. 1962) 308 F.2d 571. Smith v. Cremins (9th Cir. 1962) 308 F.2d 167.

Respectfully submitted,

JOHN D. MAHARG,
County Counsel

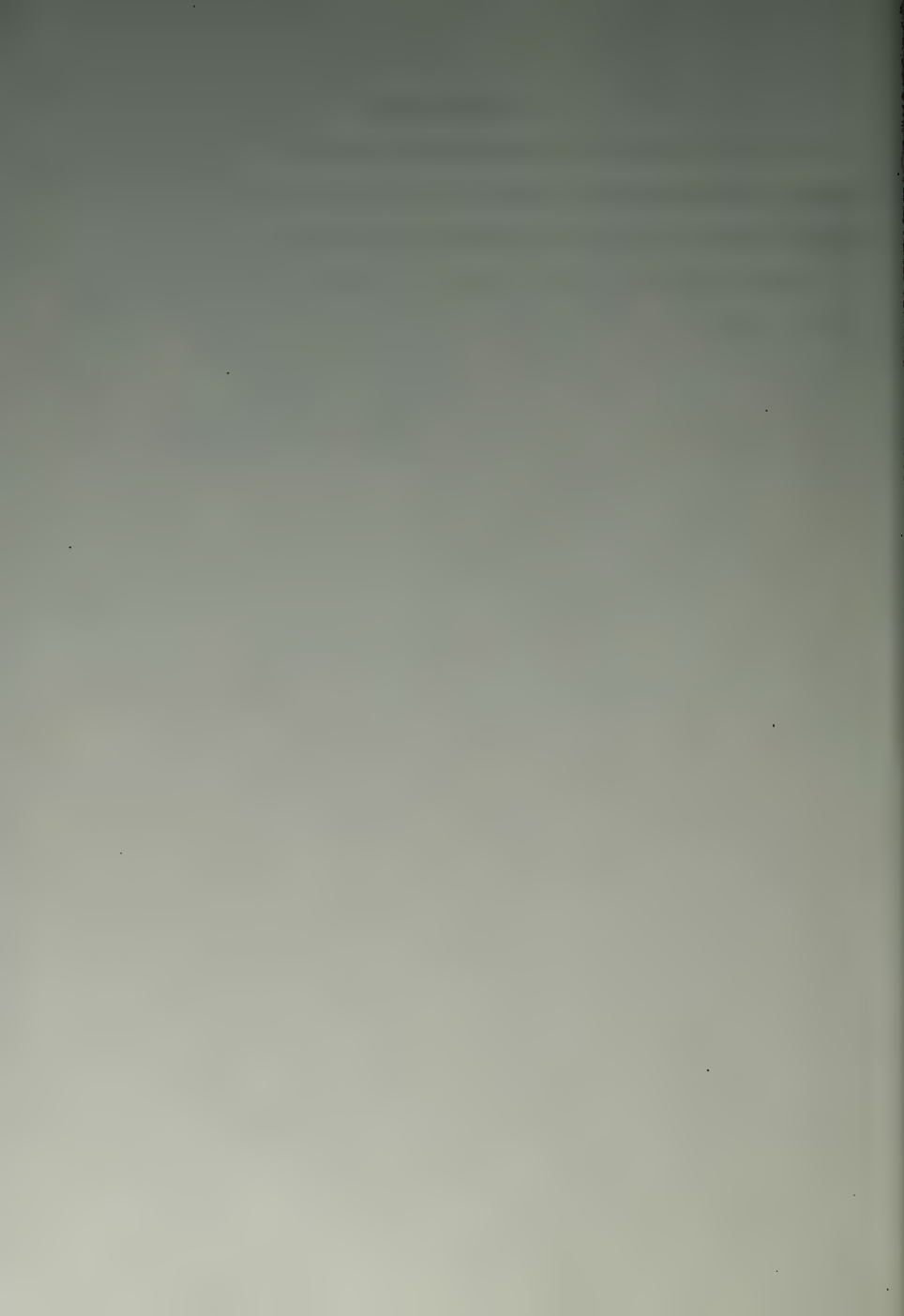
By 
Robert R. Taylor
Deputy County Counsel

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

Robert R. Taylor

ROBERT R. TAYLOR,
Deputy County Counsel
County of Los Angeles.



AFFIDAVIT OF SERVICE BY MAIL

County of Los Angeles }
State of California } ss.

Beulah Moy being first duly sworn, deposes and says:

That affiant is and was at all times herein mentioned a citizen of the United States and a resident of the County of Los Angeles, over the age of eighteen years and not a party to nor interested in the within action; that affiant's business is 648 Hall of Administration, City of Los Angeles, County of Los Angeles, State of California;

That on the 5th day of June, 1968, affiant served the attached APPELLEES' BRIEF upon Solomissey Jessy by depositing copy thereof, enclosed in a sealed envelope with postage hereon fully prepaid, in a United States mail box in Los Angeles, California, addressed as follows:

Solomissey Jessy
1967 1/2 South Raymond Avenue
Los Angeles, California 90007

and that the person on whom said service was made resides at place where there is a delivery service by United States mail, and that there is a regular communication by mail between the place of mailing and the place so addressed.

SUBSCRIBED AND SWORN to before me

this 5th day of June, 1968.

WILLIAM G. SHARP, County Clerk,

By Mary E. B. B. B.
Deputy

Beulah Moy

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SAN FRANCISCO-OAKLAND NEWSPAPER
GUILD, et al.,

Appellants,

vs.

RALPH E. KENNEDY, REGIONAL
DIRECTOR OF REGION 21 of the
National Labor Relations Board,
for and on behalf of the
NATIONAL LABOR RELATIONS BOARD,
et al.,

Appellees

NOS. 22767 ✓

22768 ✓

22769 ✓

An Appeal from the United States District Court, for
the Northern District of California, Southern Division

BRIEF OF CHARGING PARTIES - APPELLEES

McENERY & JACOBS
GARRETT McENERY, II., JR.

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FILED

MAY 7 1968

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LOS ANGELES, CALIF. 90013

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I.

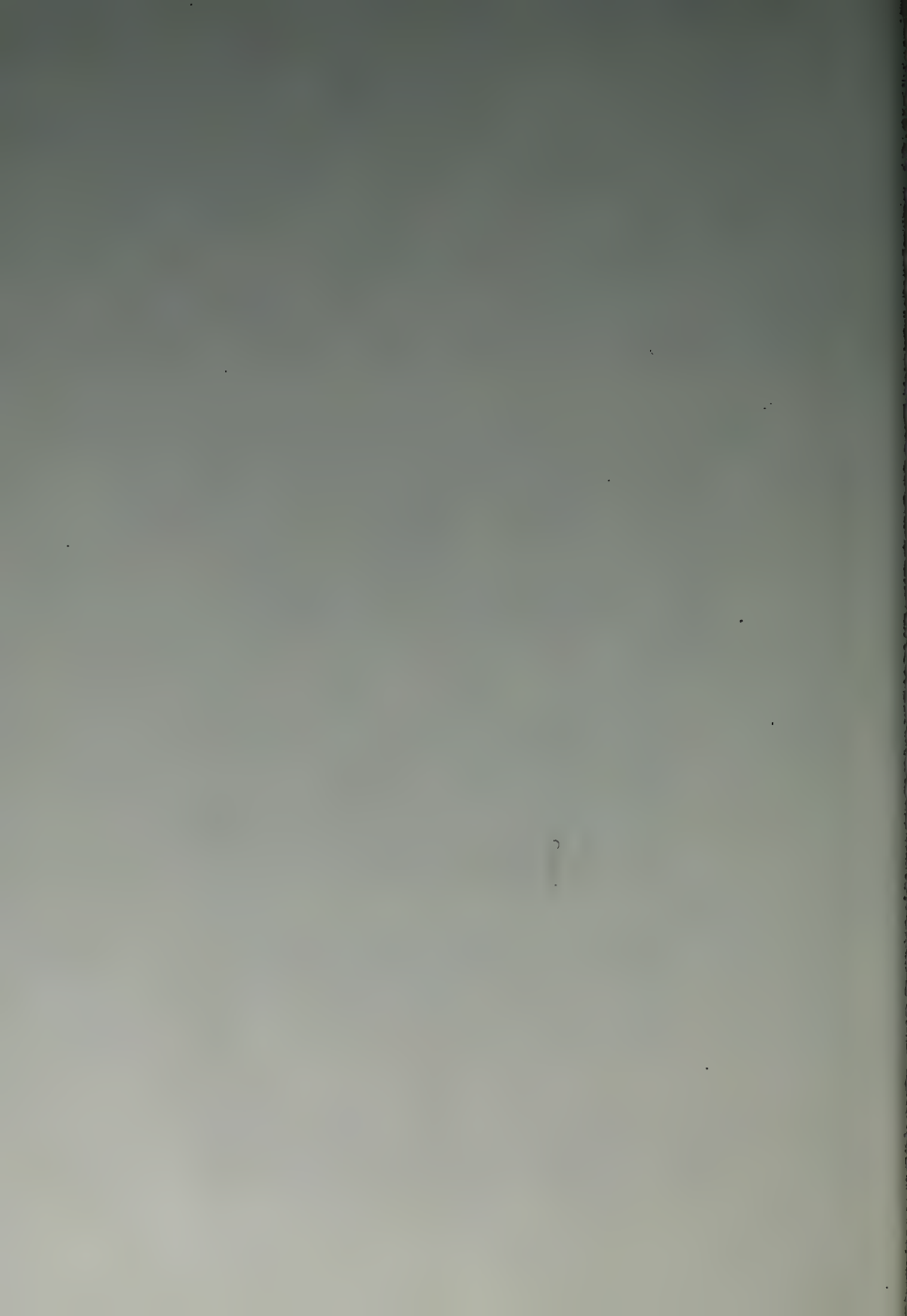
Under the "reasonable cause" standard of Section 10(1), a preliminary injunction should be granted if the District Court finds that the propositions of law and factual allegations underlying the Regional Director's petition are not insubstantial and frivolous, and on appeal, the scope of review is limited to a determination of whether the District Court's findings are clearly erroneous 11

A. The Court's role in a Section 10(1) proceeding is confined to determining whether the Regional Director has reasonable cause to believe that an unfair labor practice has been committed, and all that this requires is the prima facie establishment of facts from which an inference might be drawn that the charge is true 13

B. Upon appeal from an order granting a preliminary injunction pursuant to Section 10(1), the District Court's finding of "reasonable cause" will not be set aside unless the same is clearly erroneous 20

II.

The District Court's finding that there was reasonable cause to believe that Appellants have engaged in unfair labor practices within the meaning of Section



8(b)(4)(1)(11)(B) of the Act is
supported by substantial evidence and
is not clearly erroneous 27

A. The Regional Director's contention
that autonomous divisions of a single
corporation can be considered separate
employers within the meaning of
Section 8(b)(4)(B) is premised on an
interpretation of the Act which is
not clearly unreasonable or frivolous 27

B. The District Court's finding that
there is reasonable cause to believe
that the Los Angeles Herald-Examiner
is operated autonomously and
independently of the San Francisco
Examiner, the San Francisco Chronicle
and the San Francisco Printing
Company was not clearly erroneous 50

III.

The District Court's order denying
Appellants' request for an order
permitting depositions and/or
interrogatories and/or compelling the
attendance of witnesses was not clearly
erroneous 58

IV.

The District Court's order that all
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and that no oral testimony be heard
unless otherwise ordered by the
Court was not an abuse of discretion 68

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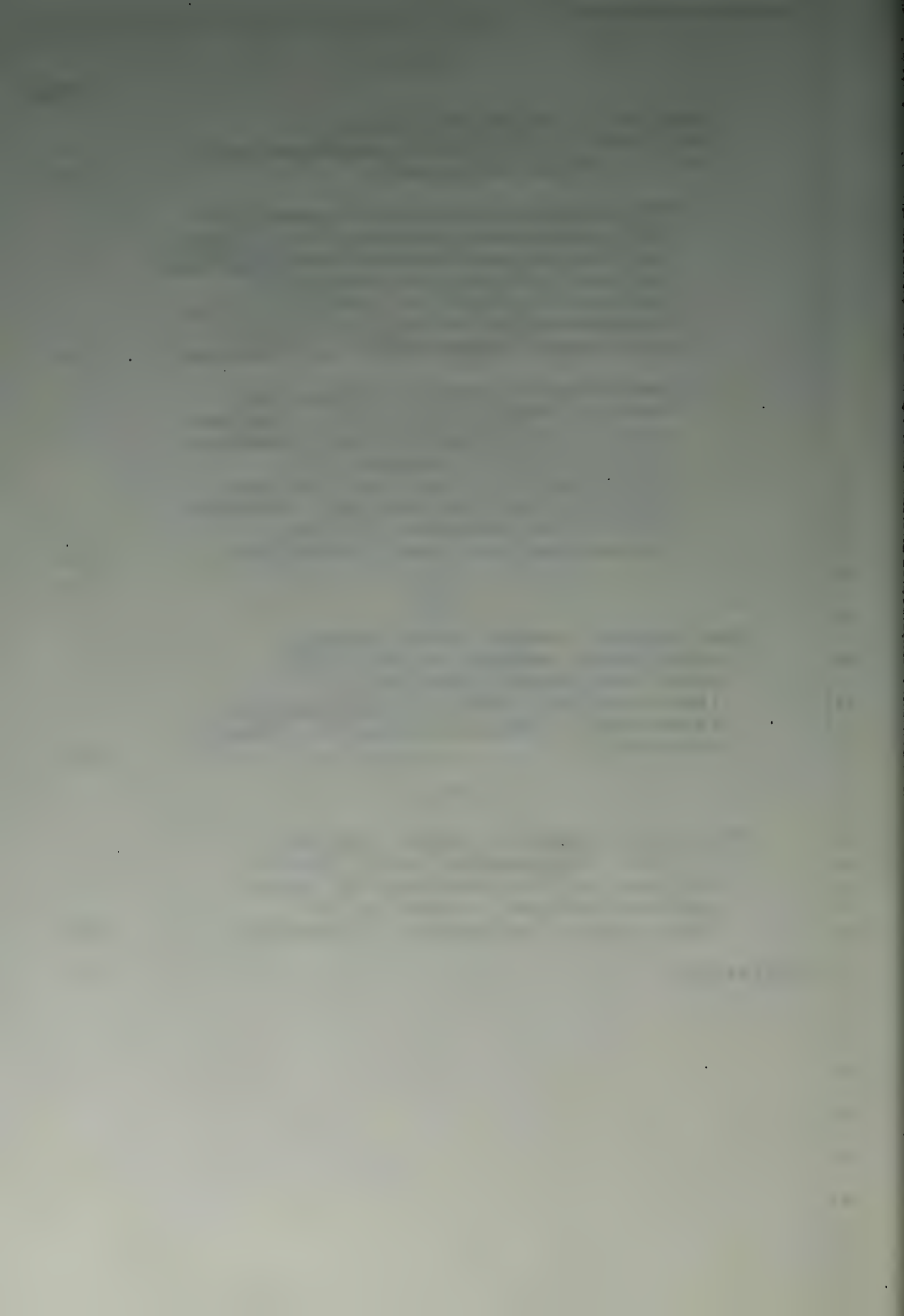


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1 UNITED STATES COURT OF APPEALS
2 FOR THE NINTH CIRCUIT
3

4 SAN FRANCISCO-OAKLAND
5 NEWSPAPER GUILD, et al.,

6 Appellants,

7 vs.

NOS. 22767
22768
22769

8 RALPH E. KENNEDY, REGIONAL
9 DIRECTOR OF REGION 21 of
10 the National Labor Relations
11 Board, for and on behalf of
12 the NATIONAL LABOR
13 RELATIONS BOARD, et al.,

14 Appellees.
15

16 BRIEF OF CHARGING PARTIES - APPELLEES
17

18 PRELIMINARY STATEMENT
19

20 This is an appeal from an order and supplemental
21 order of the United States District Court for the Northern
22 District of California entered in proceedings which were
23 instituted on behalf of the National Labor Relations Board
24 against Appellants pursuant to Section 10(1) of the
25 National Labor Relations Act (29 U.S.C. § 160 (1)).
26 Appellee Ralph E. Kennedy, Regional Director of Region 21
of the Board, petitioned the District Court seeking a pre-
liminary injunction interlocutory to the final disposition
of charges filed with the Board by the Los Angeles Herald-

1 Examiner and the San Francisco Examiner ("Charging
2 Parties") alleging that Appellants had engaged in, and
3 were engaging in, unfair labor practices within the meaning
4 of Section 8(b)(4)(1)(11)(B) of the Act (29 U.S.C. § 158(b)
5 (4)(1)(11)(B)). The order and supplemental order by the
6 court below, granting the preliminary injunction, were
7 entered on February 7 and February 8, 1968, pursuant to
8 findings of fact and conclusions of law made and filed
9 on February 7, 1968. This court's jurisdiction, on appeal
10 from those orders, is invoked under Sections 1291 and 1292
11 of Title 28 of the United States Code.

12 Subsequent to the filing of Notice of Appeal by
13 Appellants, the Charging Parties moved to intervene as
14 Appellees, and permission for the same was granted by this
15 Court on April 19, 1968. This Brief is accordingly filed
16 on behalf of Charging Parties - Appellees.

17 18 STATEMENT OF THE CASE

19 The Los Angeles Herald-Examiner (herein called
20 the "Herald-Examiner") publishes a daily and Sunday news-
21 paper in Los Angeles, California. It is an independent
22 division of The Hearst Corporation. The San Francisco
23 Examiner (herein called the "Examiner"), publishes a daily
24 newspaper in San Francisco, California, and also publishes
25 a Sunday newspaper jointly with the Chronicle Publishing
26 Company. The Chronicle Publishing Company (herein called

1 "Chronicle"), a Nevada corporation, publishes a daily news-
2 paper in San Francisco known as The Chronicle. The San
3 Francisco Newspaper Printing Company (herein called "Print-
4 ing Company"), a Nevada corporation, is located in San
5 Francisco and is engaged in the business of newspaper print-
6 ing. It performs the mechanical, circulation, advertising,
7 accounting, credit and collection functions for both the
8 Examiner and the Chronicle.

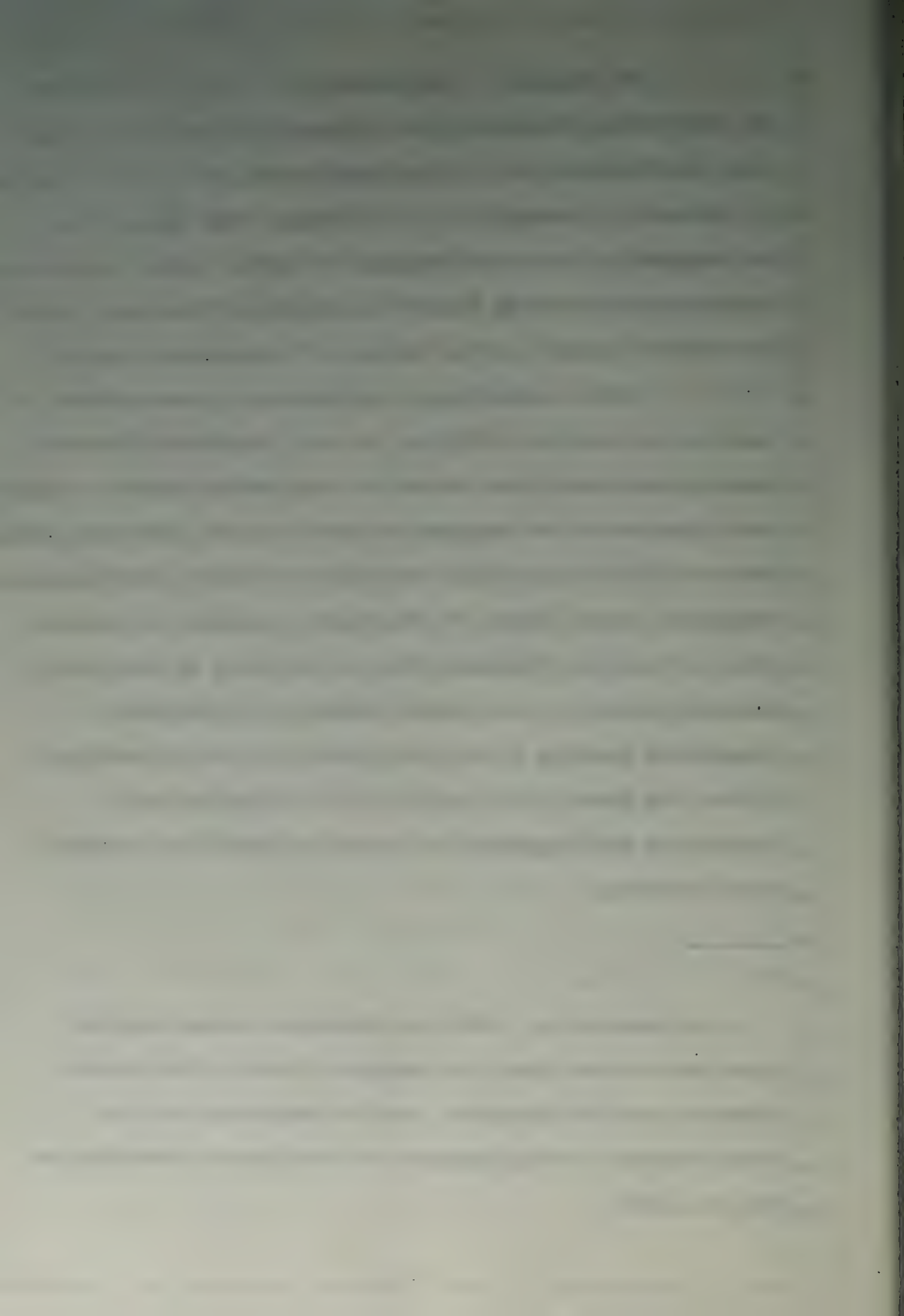
9 On or about December 15, 1967, the Appellant labor
10 organizations, with the exception of the San Francisco-
11 Oakland Newspaper Guild, commenced picketing the plant and
12 premises of the Los Angeles Herald-Examiner in support of
13 a labor dispute with that newspaper. Subsequently, on or
14 about January 5, 1968, and for the purpose of supporting
15 the labor dispute with the Herald-Examiner, Appellants
16 commenced picketing the San Francisco plants and premises
17 of the Examiner, the Chronicle and the Printing Company
18 and distributing hand bills to employees and the public at
19 those locations. Appellant San Francisco-Oakland News-
20 paper Guild orally instructed its members employed by the
21 Printing Company to engage in work stoppages and refusals
22 to perform services for their employer. As a result of
23 these acts, the newspaper publication and printing
24 facilities of the Examiner, the Chronicle and the Printing
25 Company were shut down.

1 On January 5, and January 6, 1968 the Examiner
2 and the Herald-Examiner filed charges and amended charges
3 with the National Labor Relations Board, and filed addition-
4 al charges on January 10, all alleging that Appellants
5 had engaged in and were engaging in unfair labor practices
6 prohibited by Section 8(b)(4)(1)(11)(B) of the Act, which
7 proscribes conduct in the nature of a secondary boycott.

8 After conducting a preliminary investigation, as
9 required by Section 10(1) of the Act, Regional Director
10 Kennedy concluded that there was reasonable cause to believe
11 that Appellants had engaged in unfair labor practices under
12 Section 8(b)(4)(1)(11)(B) and that an unfair-labor-practice
13 complaint should issue.* Thereupon, pursuant to Section
14 10(1) of the Act, Kennedy filed a petition in the Court
15 below on behalf of the Board seeking a preliminary
16 injunction pending final disposition of the proceedings
17 before the Board. The petition for a preliminary
18 injunction was supported by twenty affidavits, together
19 with exhibits.

20
21 *

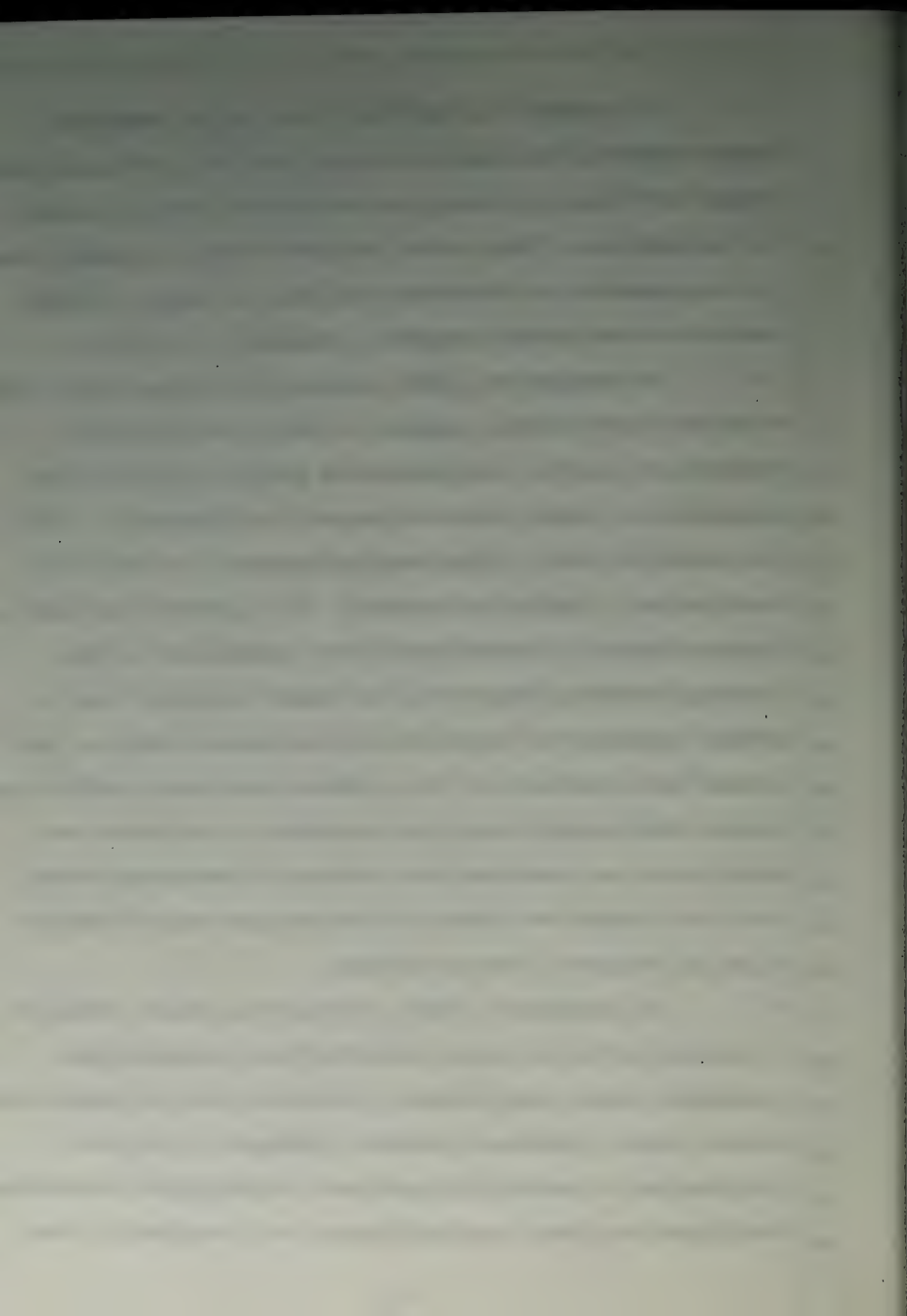
22 On January 19, 1968 the complaint issued against
23 Appellants based upon the charges filed by the Herald-
24 Examiner and the Examiner, and is presently set for
25 trial before a Trial Examiner of the Board commencing on
26 May 20, 1968.



1 On January 12, 1968 the Court below issued an
2 order requiring Appellants to show cause why an injunction
3 should not issue enjoining and restraining them as prayed
4 in the petition. That order provided that all evidence was
5 to be presented by affidavits and that no oral testimony
6 would be heard unless otherwise ordered by the Court.

7 On January 24, 1968 certain of the Appellants filed
8 with the Court below a request for an order permitting
9 depositions and/or interrogatories and/or compelling the
10 attendance of eight named witnesses. On January 31, 1968
11 the District Court, after hearing arguments on the afore-
12 said request, denied the request. In rejecting this and a
13 further request of Appellants for a continuance of the
14 hearing to enable discovery, the Court concluded that to
15 permit discovery by depositions or otherwise would at best
16 create only conflicts in the evidence and raise credibility
17 issues which would have to be resolved by the Board and
18 which would not overcome the showing of reasonable cause
19 that was clearly set forth in the petition and affidavits
20 filed by Regional Director Kennedy.

21 On February 7, 1968, the District Court conducted
22 a hearing on the petition, and after oral argument and
23 consideration of the evidence, concluded that an injunction
24 should issue. The Court entered findings of fact and
25 conclusions of law on the same date, finding and concluding
26 that there was, and that petitioner had, reasonable cause



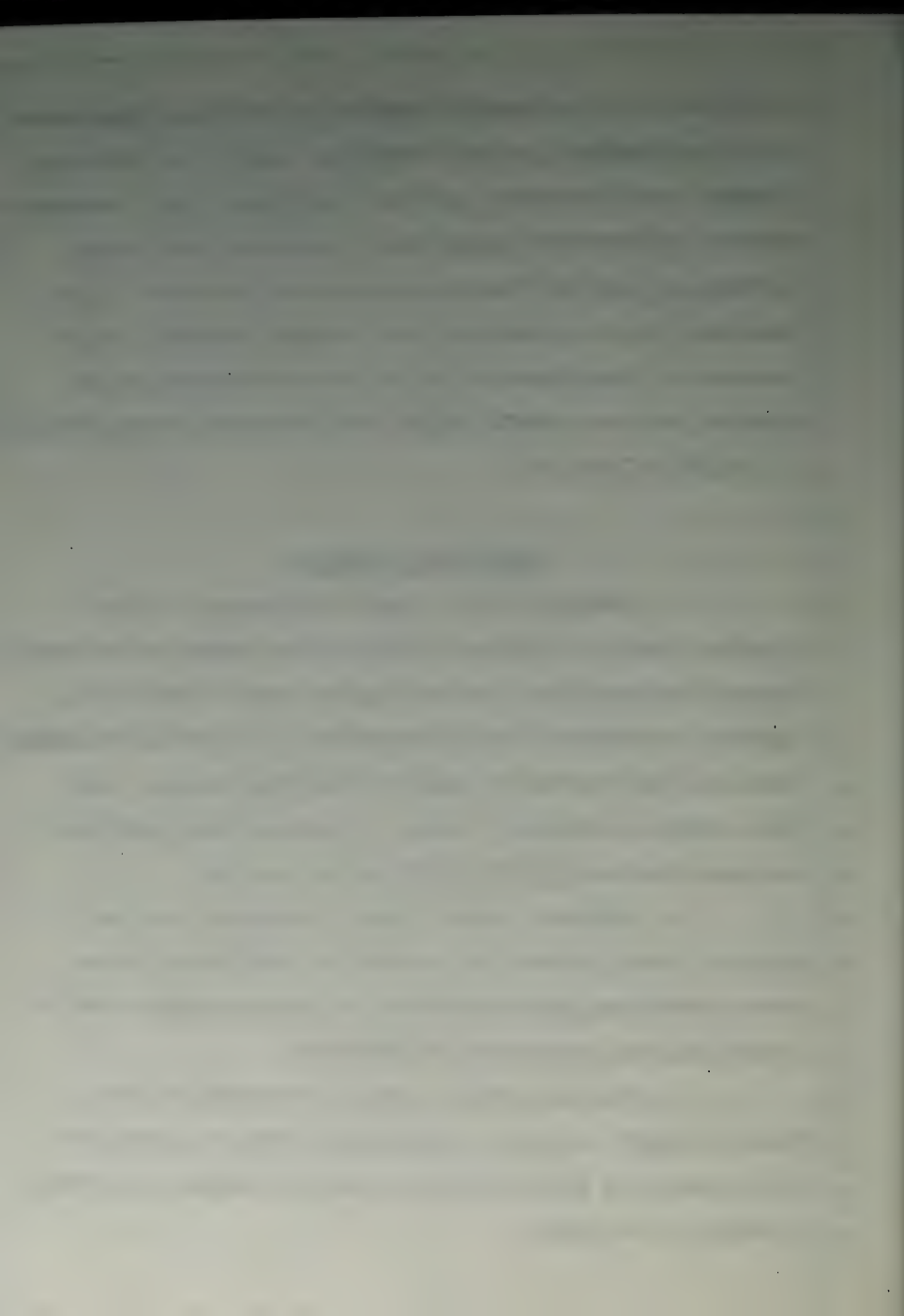
1 to believe that the Herald-Examiner is operated independent-
2 ly of the Examiner, of the Chronicle, and of the Printing
3 Company; that there was, and that petitioner had, reasonable
4 cause to believe that appellants' picketing, and other
5 conduct, at the San Francisco plants and premises of the
6 Examiner, the Chronicle and the Printing Company, in fur-
7 therance of the dispute with the Herald-Examiner in Los
8 Angeles, had an unlawful object and violated Section 8(b)(4)
9 (1)(11)(B) of the Act.

10
11 QUESTIONS PRESENTED

12 1. Whether it was clearly erroneous for the
13 District Court to find and conclude that there is reasonable
14 cause to believe that the Los Angeles Herald-Examiner is
15 operated autonomously and independently of the San Francisco
16 Examiner, the Chronicle, and the Printing Company, and
17 that there is reasonable cause to believe that Appellants
18 violated Section 8(b)(4)(1)(11)(B) of the Act.

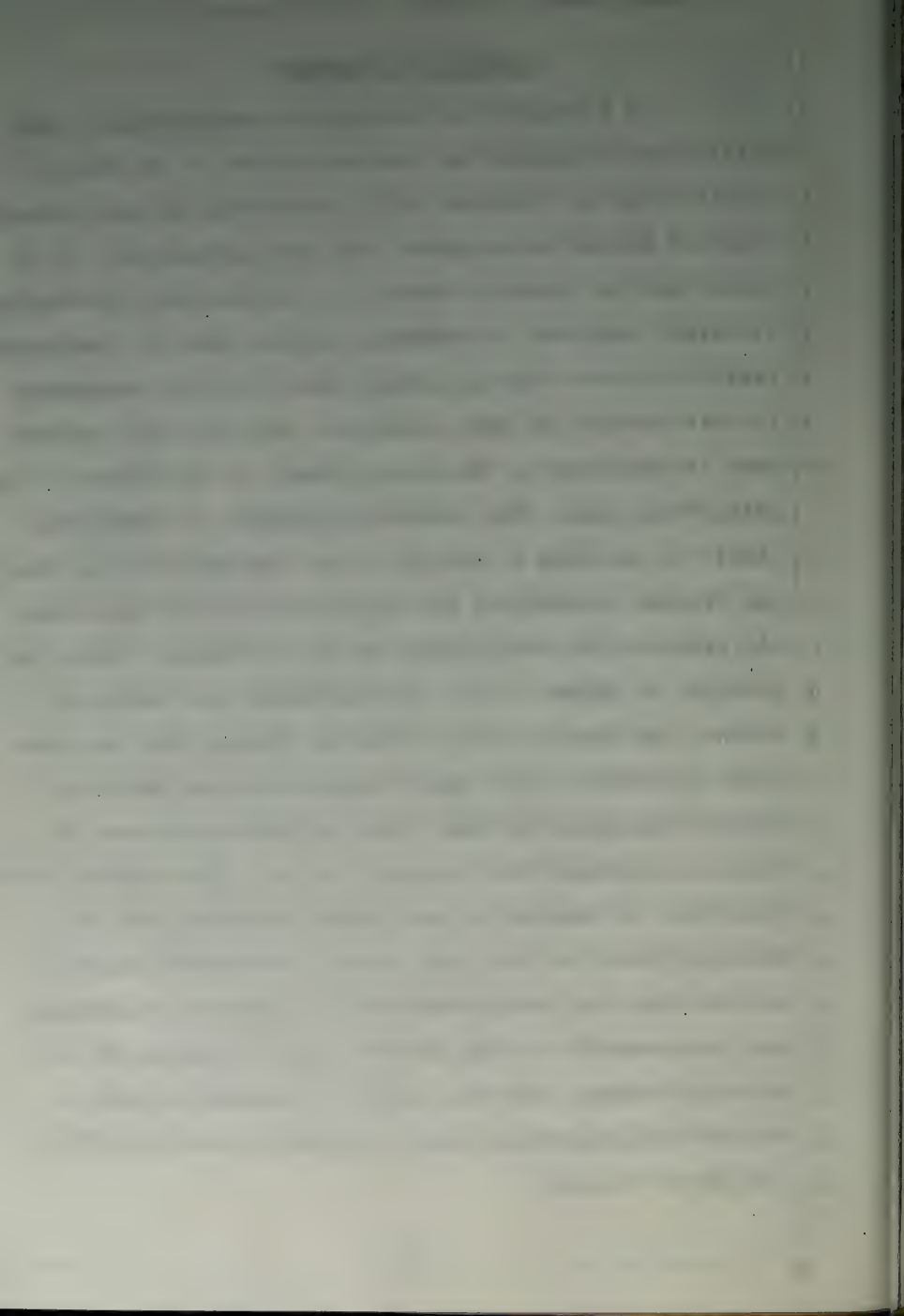
19 2. Whether it was clearly erroneous for the
20 District Court to deny the request of Appellants for an
21 order permitting depositions and/or interrogatories and/or
22 compelling the attendance of witnesses.

23 3. Whether it was clearly erroneous for the
24 District Court to enter a show-cause order requiring that
25 all evidence be presented by affidavits, unless otherwise
26 ordered by the Court.

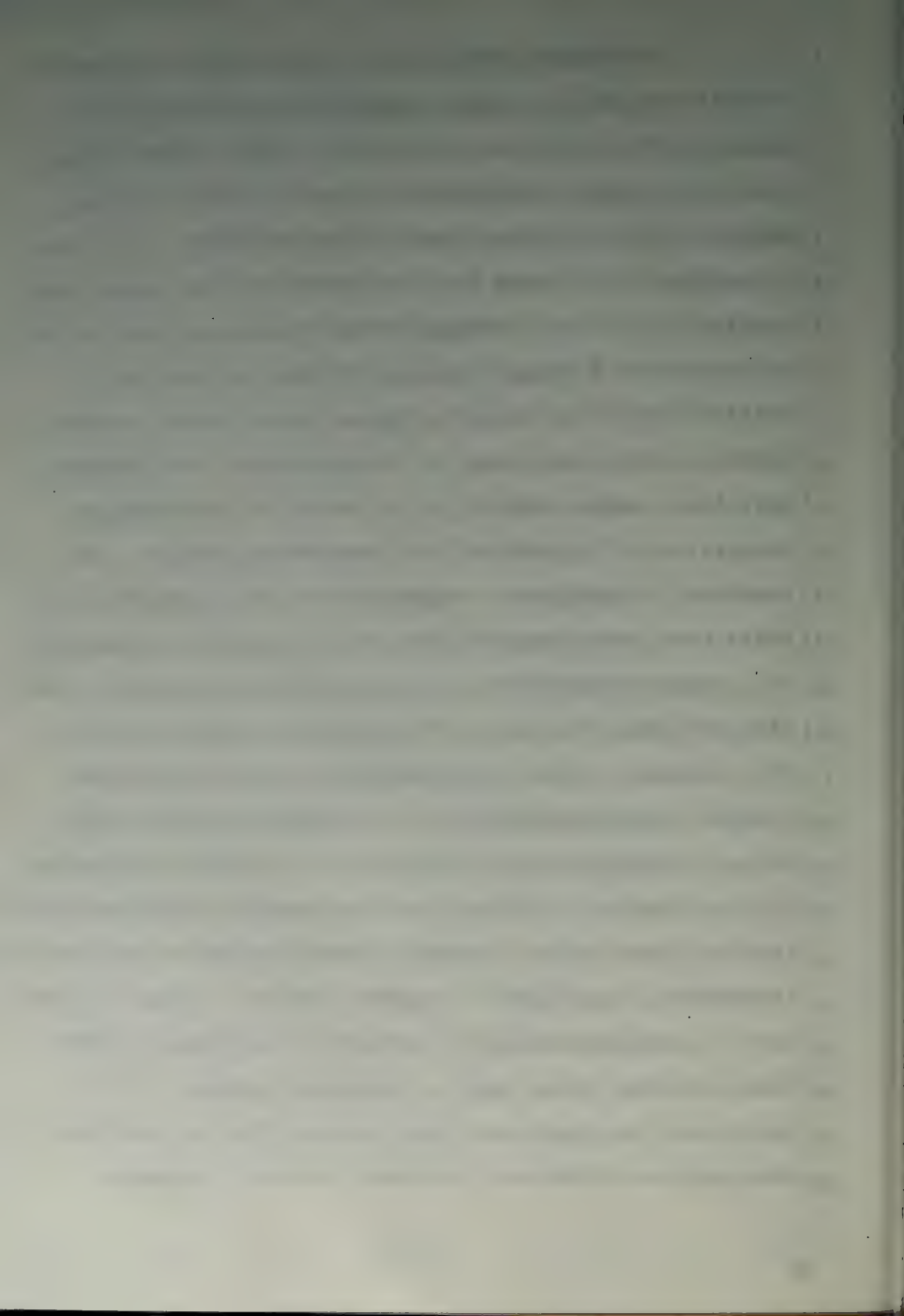


SUMMARY OF ARGUMENT

As a subject for preliminary consideration, this brief first discusses the confined nature of the District Court's role in a Section 10(1) proceeding and the limited scope of review on an appeal from such proceeding. It is shown that the District Court in a Section 10(1) proceeding is merely required to determine whether there is reasonable cause to believe that an unfair labor practice enumerated in that section has been committed, and that this requirement is satisfied by the establishment of the elements of a prima facie case. The statutory standard of "reasonable cause" is met upon a showing by the Regional Director that the factual contentions and legal propositions underlying his petition are substantial and not frivolous. Thus, the question on appeal is not, as Appellants have asserted, whether the District Court erred in finding that the newspaper divisions of The Hearst Corporation are genuinely neutral employers and that there is reasonable cause to believe Appellants had violated the Act. The question before this Court is whether it was clearly erroneous for the District Court to find that there is reasonable cause to believe that the Herald-Examiner is operated autonomously and independently of the Examiner, the Chronicle and the Printing Company, and that there is reasonable cause to believe that Appellants have violated Section 8(b)(4)(i) (11)(B) of the Act.

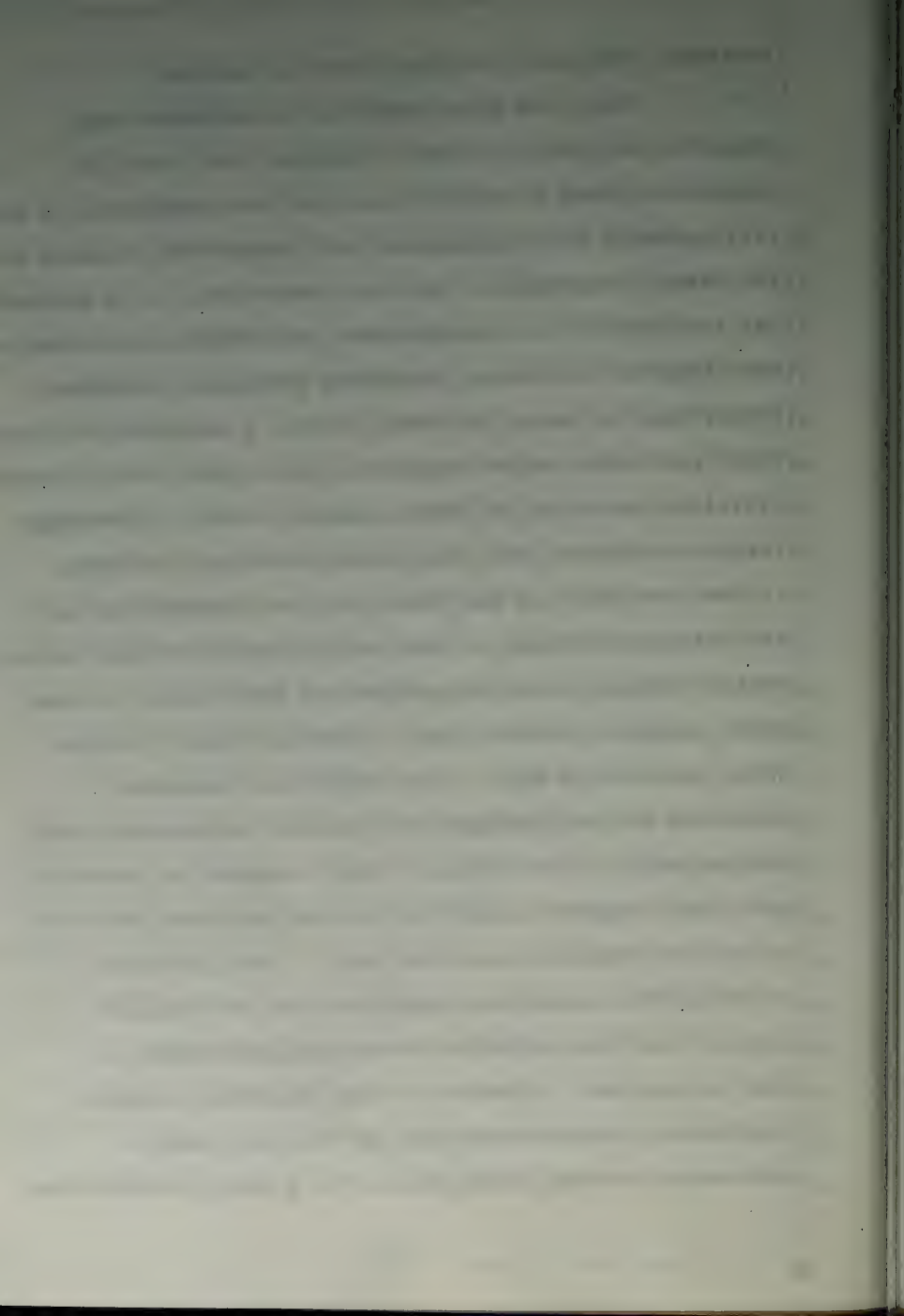


1 Discussion then turns to the authorities which
2 demonstrate that the legal proposition underlying the
3 Regional Director's petition herein is not frivolous and
4 that it presents a substantial issue of law for deter-
5 mination by the National Labor Relations Board. In this
6 connection it is shown that the Board and the courts have
7 adopted a rule that commonly owned enterprises are not to
8 be considered a single employer within the meaning of
9 Section 8(b)(4) of the Act, unless there is such active
10 common control over them, as distinguished from merely a
11 potential common control, as to denote an appreciable
12 integration of operations and management policies. In
13 response to Appellants' argument that the courts and the
14 Board have never applied this rule to separate divisions
15 of a single corporation, it is pointed out that this ques-
16 tion has only been before the Board one time and that in
17 that instance, rather than adopting a rule of law pre-
18 cluding separate divisions of a single corporation from
19 being considered separate employers, the Board predicated
20 its decision on a finding that the separate divisions there
21 involved were in fact commonly controlled and operationally
22 integrated. Appellants' argument that the "common control"
23 test is only applicable in situations involving separate
24 legal entities rests upon a fallacious premise that the
25 courts and the Board will look through form to substance
26 when multiple forms are involved, but will disregard



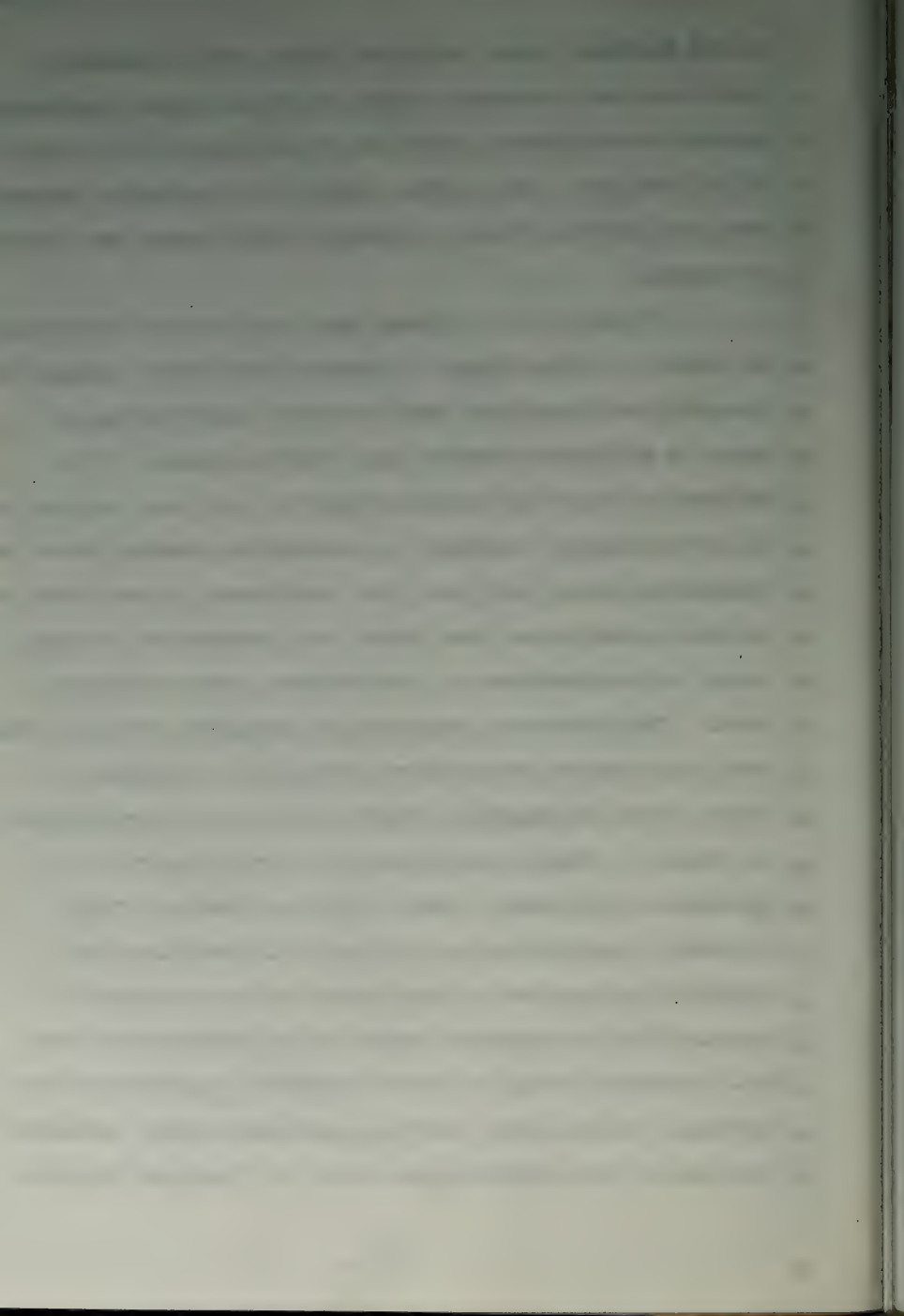
1 substance when only one legal form is involved.

2 Next, the brief examines the evidence which
3 supports the District Court's findings that there is
4 reasonable cause to believe that the Hearld-Examiner is in
5 fact operated as an autonomous and independent division of
6 The Hearst Corporation. In this connection, it is pointed
7 out that Hearst is a conglomerate corporation consisting of
8 many separate divisions, including newspaper publishing
9 enterprises in seven different cities, a magazine division
10 which publishes twelve magazines, three radio and television
11 divisions operating in three separate cities, a newspaper
12 feature syndicate, two real estate divisions operating
13 in New York City and San Francisco, an international art
14 and antiques division, a land and livestock division which
15 manages western ranch properties and timberlands, a news-
16 paper supplies division, and a specialty paper division
17 which operates in Maine. The individual newspaper
18 divisions are each managed and operated autonomously and
19 independently of the others. Each newspaper is operated
20 under the complete control of its own publisher assisted
21 by his own separate executive staff. Each publisher
22 or one of his executives negotiates and has complete
23 control over the collective bargaining agreements of
24 that enterprise. A review of this and other evidence
25 conclusively demonstrates that at the very least a
26 substantial factual issue exists for primary determination



1 by the National Labor Relations Board, and accordingly,
2 that there was reasonable cause to believe that Appellants'
3 conduct constituted a violation of Section 8(b)(4)(i)(ii)
4 (B) of the Act. In no event could it be seriously contended
5 that the District Court's ruling in this regard was clearly
6 erroneous.

7 Finally, it is shown that the District Court did
8 not abuse its discretion in denying Appellants' request for
9 discovery and requiring that the show cause hearing be
10 based on affidavits rather than oral testimony. It is
11 pointed out that the District Court's role in a Section 10
12 (1) proceeding is confined to determining whether there is
13 reasonable cause, and that this requirement is met when the
14 evidence establishes that there is a substantial factual
15 issue to be determined by the National Labor Relations
16 Board. The discovery requested by Appellants would at best
17 have only created evidentiary conflicts or credibility
18 issues which the District Court did not have jurisdiction
19 to resolve. Many of the authorities relied upon by
20 Appellants are cases in which the Board had not filed
21 affidavits supporting its Section 10(1) petition, and
22 limited discovery was allowed only for the purpose of
23 insuring that respondents would not be surprised by the
24 oral testimony which the Board intended to present at the
25 hearing. In this case however, Appellants were furnished
26 with all of the evidence upon which the Regional Director

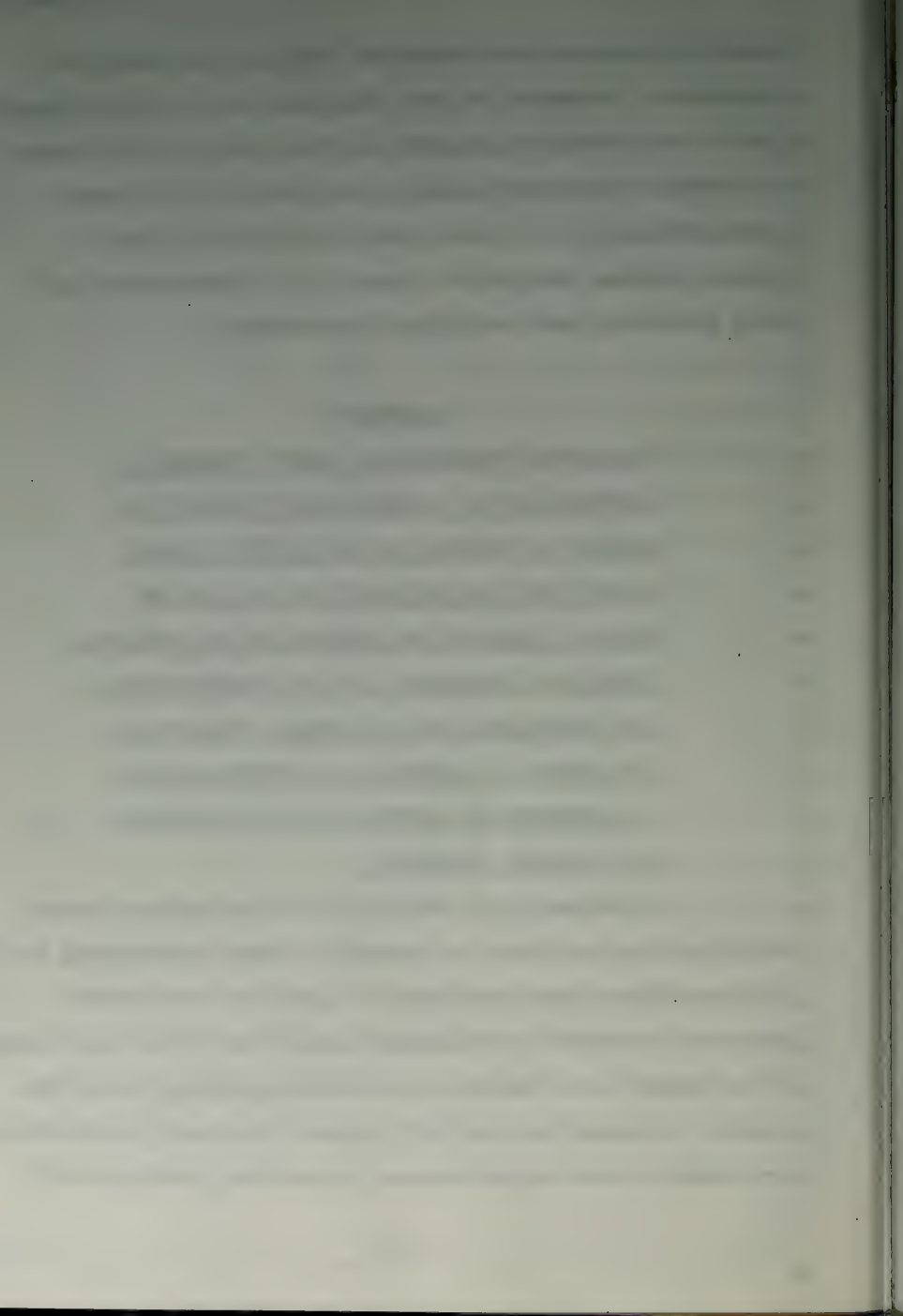


1 based his petition and there was thus no such need for
2 discovery. Moreover, it has long been held in this Circuit
3 that a preliminary injunction may be granted on the basis
4 of evidence presented solely by affidavits. In these
5 circumstances, it is clear that the District Court's
6 orders denying Appellants' requests for depositions and
7 oral testimony were not clearly erroneous.

8 9 ARGUMENT

10 I. UNDER THE "REASONABLE CAUSE" STANDARD OF
11 SECTION 10(1), A PRELIMINARY INJUNCTION
12 SHOULD BE GRANTED IF THE DISTRICT COURT
13 FINDS THAT THE PROPOSITIONS OF LAW AND
14 FACTUAL ALLEGATIONS UNDERLYING THE REGIONAL
15 DIRECTOR'S PETITION ARE NOT INSUBSTANTIAL
16 AND FRIVOLOUS, AND ON APPEAL, THE SCOPE
17 OF REVIEW IS LIMITED TO A DETERMINATION
18 OF WHETHER THE DISTRICT COURT'S FINDINGS
19 ARE CLEARLY ERRONEOUS.

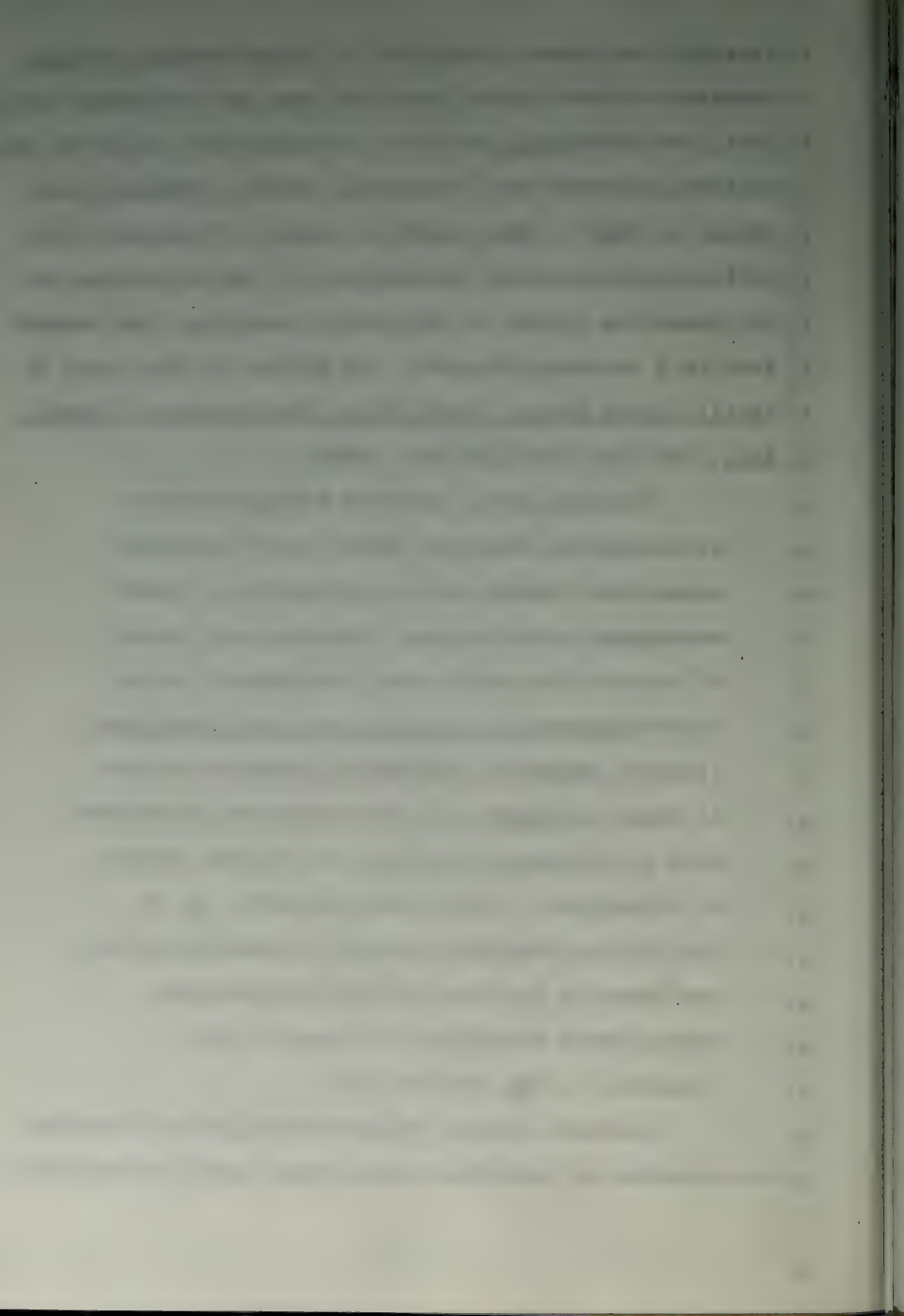
20 Sections 10(j) and 10(1) of the National Labor
21 Relations Act set forth a statutory scheme authorizing the
22 National Labor Relations Board to petition the federal
23 district courts for preliminary injunctive relief ancillary
24 to an unfair labor practice proceeding pending before the
25 Board. Although Section 10(j) grants the Board discretion-
26 ary power to seek a preliminary injunction, Section 10(1)



1 provides that when a complaint is filed charging certain
2 enumerated unfair labor practices such as a secondary boy-
3 cott, the Board must petition for injunctive relief if the
4 Regional Director has "reasonable cause to believe such
5 charge is true". This mandatory nature of Section 10(1)
6 reflects Congressional recognition of the seriousness of
7 the immediate injury to the public resulting from conduct
8 such as a secondary boycott. As stated by this court in
9 Retail Clerks Union, Local 137 v. Food Employers Council,
10 Inc., 351 F.2d 525 (9th Cir. 1965):

11 "Section 10(1) reflects a Congressional
12 determination that the unfair labor practices
13 enumerated therein are so disruptive of labor-
14 management relations and threaten such danger
15 of harm to the public that they should be en-
16 joined whenever a district court has been shown
17 [court's emphasis] reasonable cause to believe
18 in their existence and finds that the threatened
19 harm or disruption can best be avoided through
20 an injunction. [Citations omitted]. It is
21 not for the Regional Director to substitute his
22 own ideas of how best to deal with alleged
23 unfair labor practices for those of the
24 Congress." (351 F.2d at 531).

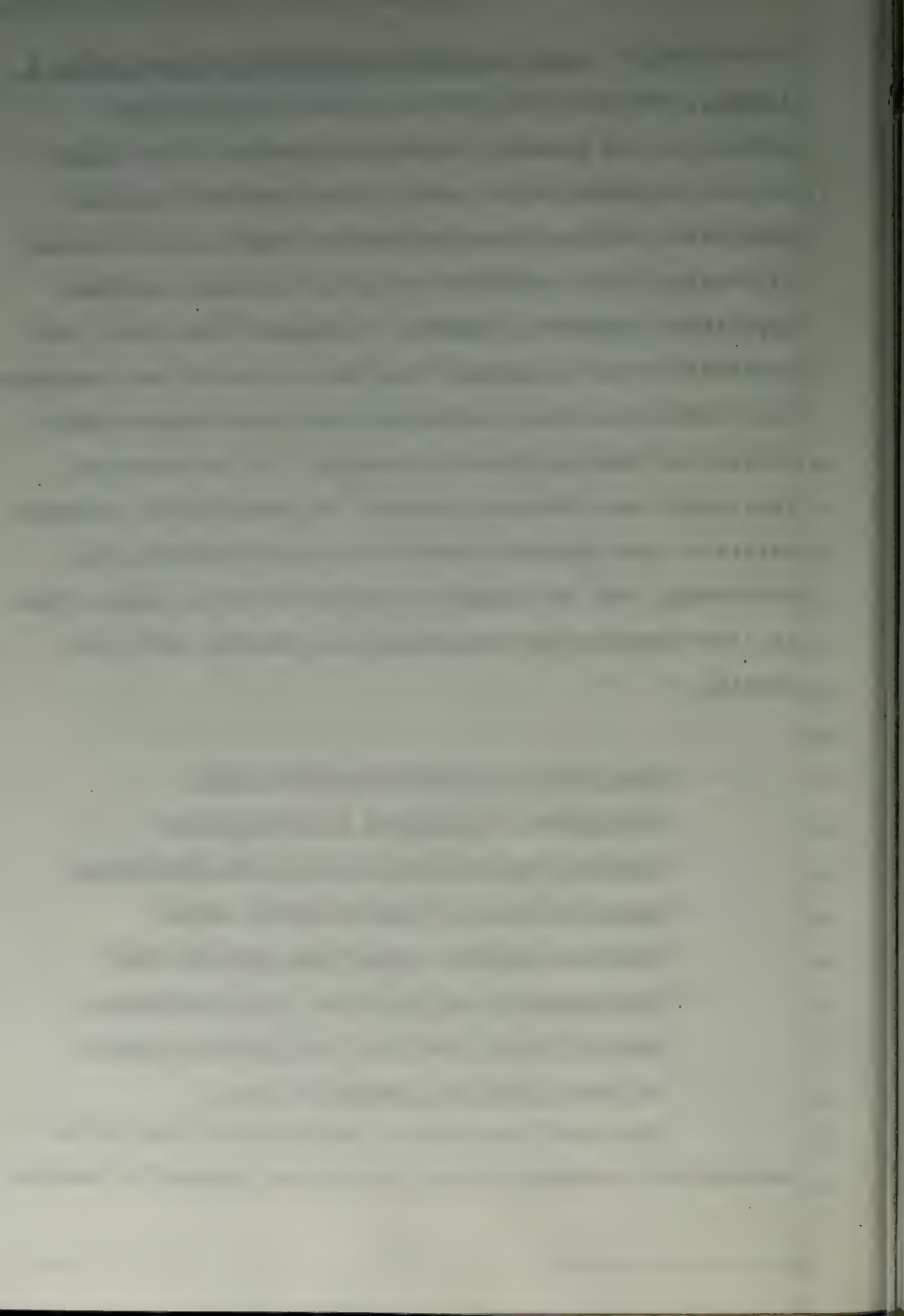
25 In view of this "Congressional policy favoring
26 the granting of temporary injunctions under Section 10(1)



1 of the Act," (Local No. 83, Construction Drivers Union v.
2 Jenkins, 308 F.2d 516, 517 fn.1 (9th Cir. 1962) and
3 because of the primary jurisdiction vested in the Board
4 for the adjudication of unfair labor practice charges,
5 the courts have uniformly recognized that judicial review
6 of Section 10(1) petitions should be narrowly confined.
7 Appellants' argument, however, disregards this fact, and
8 proceeds on the assumption that the merits of the complaint
9 were before the Court below that this Court should fully
10 review the District Court's findings. It is therefore
11 important, as a threshold matter, to focus on the confined
12 nature of the District Court's role in a Section 10(1)
13 proceeding, and the limited scope of review on appeal from
14 an order granting an injunction in a Section 10(1) pro-
15 ceeding.

16
17 A. The Court's Role In A Section 10(1)
18 Proceeding Is Confined To Determining
19 Whether The Regional Director Has Reasonable
20 Cause To Believe That An Unfair Labor
21 Practice Has Been Committed. And All That
22 This Requires Is The Prima Facie Establish-
23 ment Of Facts From Which An Inference Might
24 Be Drawn That The Charge Is True.

25 The sole issue before the District Court at a
26 hearing on a petition for an injunction pursuant to Section



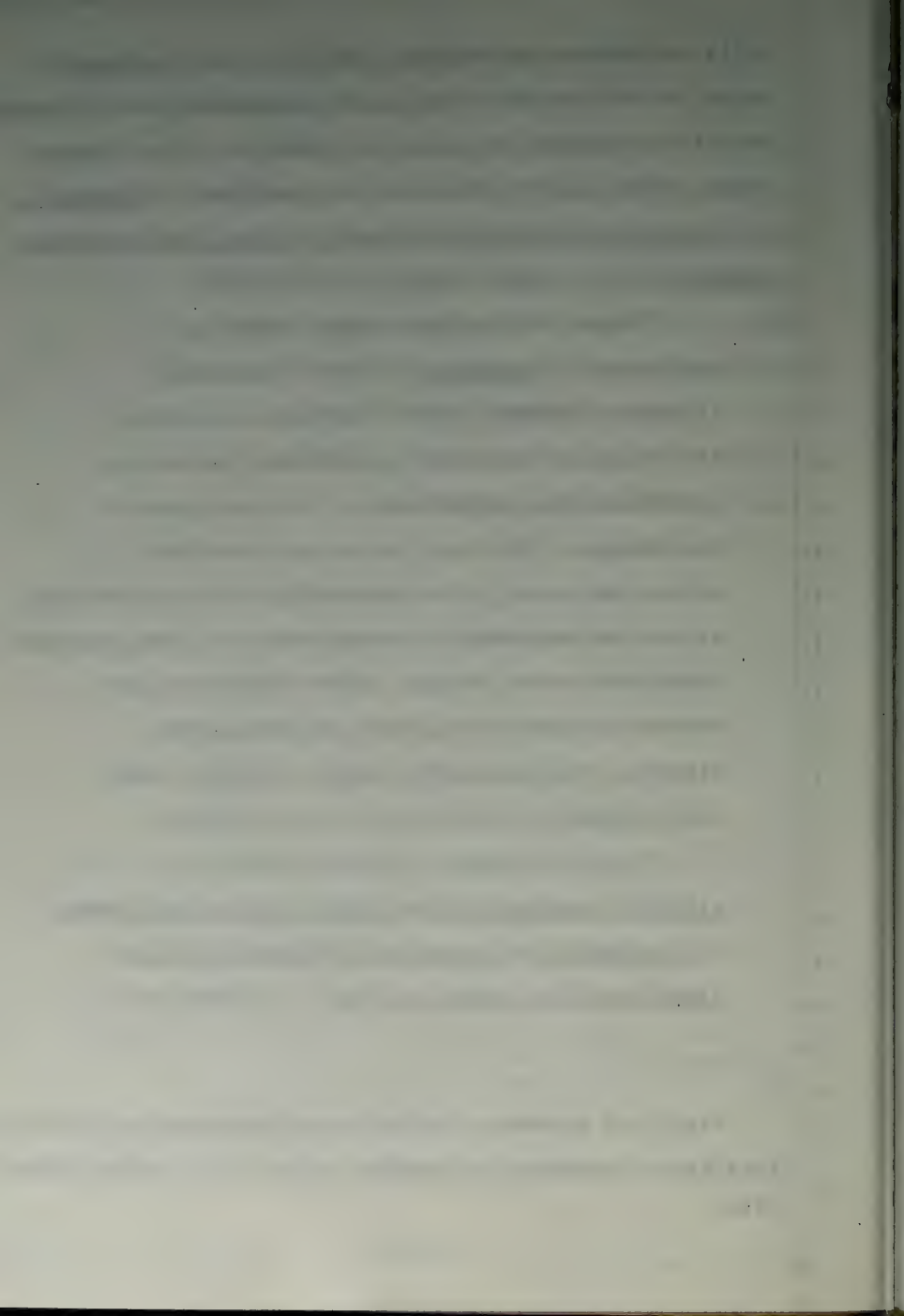
1 10(1) is whether the Regional Director has "reasonable
2 cause" to believe that the named respondents have violated
3 the Act as alleged by him in his petition. The limited
4 scope of the court's function was described in Kennedy v.
5 Los Angeles Joint Executive Board of Hotel and Restaurant
6 Employees, 192 F.Supp. 339 (S.D.Cal. 1961):

7 "Under the Act the remedy sought in
8 the courts is temporary [Court's emphasis]
9 in nature because it is effective only until
10 the Board, in adversary proceedings before it,
11 determines the correctness or incorrectness of
12 the charges. For this reason the question
13 before the court, in a proceeding of this character,
14 is not the existence or nonexistence of the practices
15 contained in the charges before the Board, but
16 whether in instituting this proceeding the
17 Director 'has reasonable cause to believe that
18 such charge is true' 29 U.S.C.A. § 160(1).

19 "The courts have uniformly held that
20 all this requires is the prima facie establishment
21 of the facts from which an inference might be
22 drawn that the charge is true.* If this be so,

23
24 *

25 Here, and elsewhere in the quoted passages set forth in
26 this Brief, emphasis is supplied unless it is noted other-
wise.

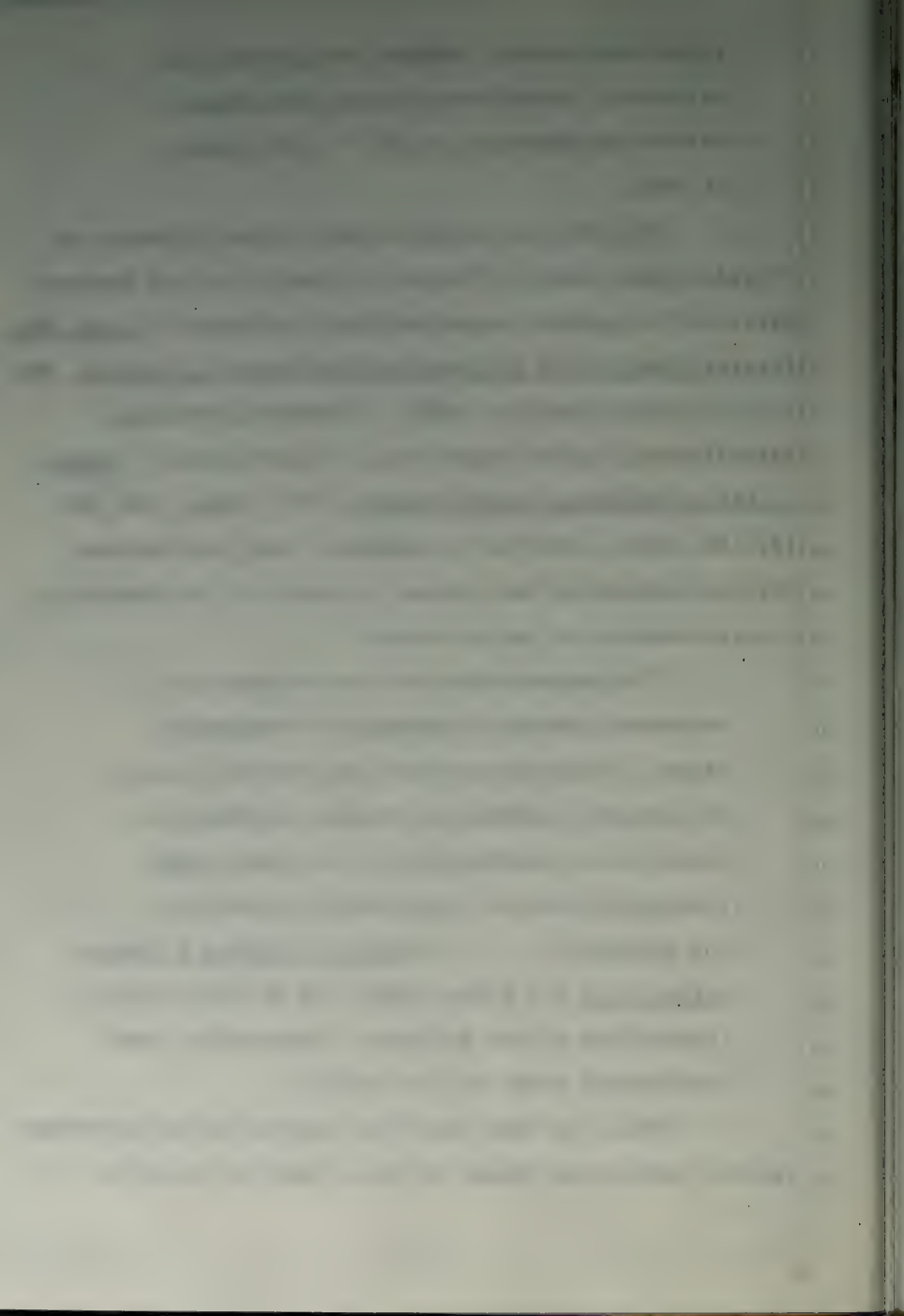


1 injunction issues, whether the charges are
2 ultimately proved true in the proceedings
3 before the Director or not." (192 F.Supp.
4 at 341).

5 In order to establish the factual elements of
6 "a prima facie case" it is not necessary for the Regional
7 Director "to present uncontradicted testimony". Local 450,
8 International Union of Operating Engineers v. Elliott, 256
9 F.2d 630, 638 (5th Cir. 1958). "Credible evidence,
10 establishing a prima facie case, is sufficient." Greene
11 v. Bangor Building Trades Council, 165 F.Supp. 902, 903
12 (N.D.Me. 1958). Nor is it necessary that the Regional
13 Director establish the factual elements of his charge by
14 a preponderance of the evidence:

15 "No preponderance of the evidence is
16 necessary, merely a showing of 'reasonable
17 cause', [Citation omitted] and the Court may
18 not resolve conflicting factual evidence and
19 questions of credibility if the Board might
20 reasonably resolve those issues in favor of
21 the plaintiff . . ." (Fusco v. Richard W. Kaase
22 Baking Co., 205 F.Supp. 459, 463 (N.D.Ohio 1962)
23 [Commenting on the analogous "reasonable cause"
24 requirement under Section 10(j)].

25 Thus, as this Court has stated, if the pleadings
26 raise a substantial issue of fact, that in itself is

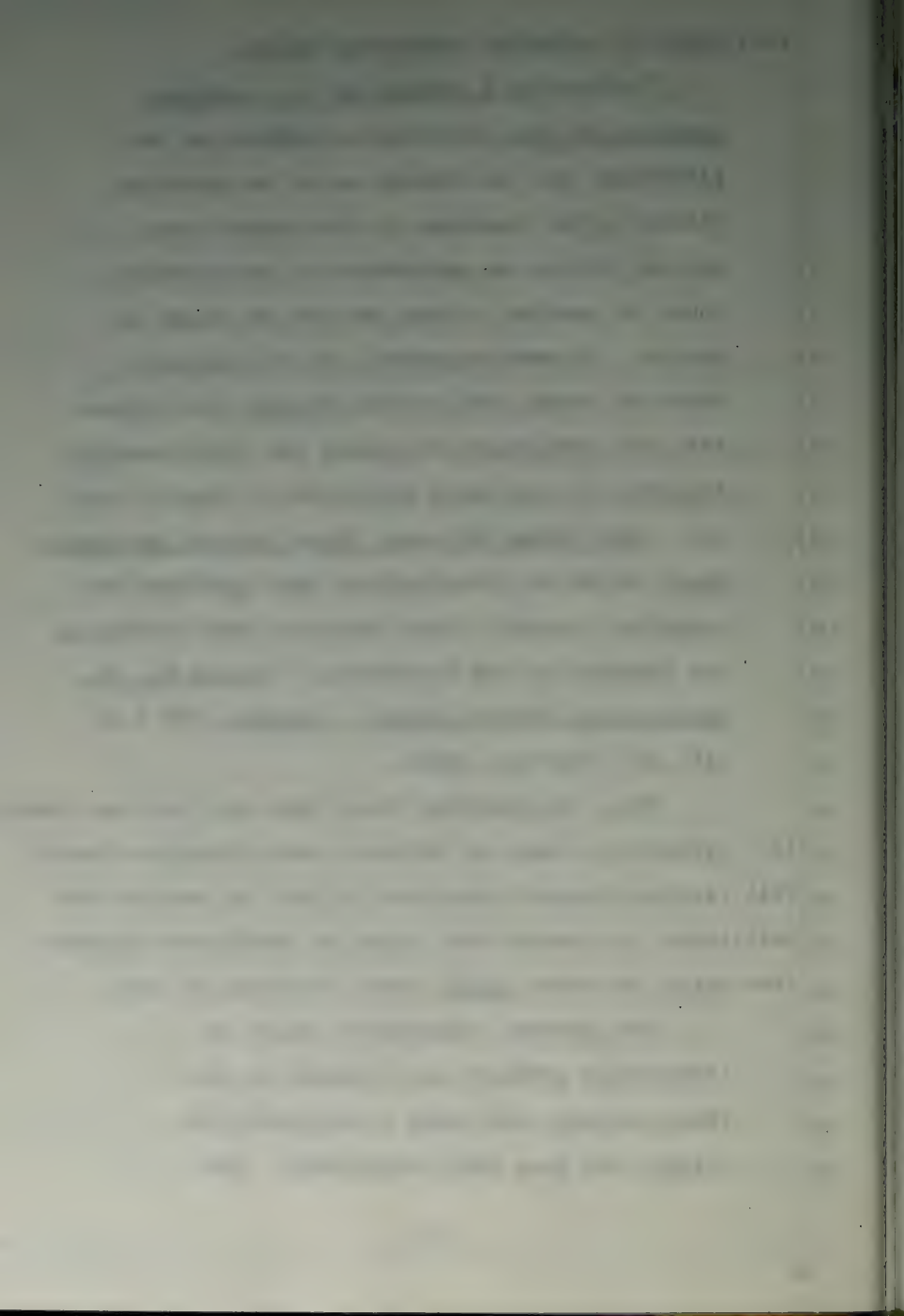


1 sufficient to establish reasonable cause:

2 "Ordinarily a dispute as to a material
3 question of fact precludes a judgment on the
4 pleadings, but the dispute as to the question
5 raised by the pleadings in the instant case
6 was not within the providence of the District
7 Court to resolve; it was one for the Board to
8 decide. It seems apparent, and the District
9 Court so found, that the Board could find either
10 that the certification covered the three Goodrich
11 employees at the Union Rock plant or that it did
12 not. That being the case, there existed reasonable
13 cause raised by the pleadings that Appellant was
14 engaging in unfair labor practice, thus justifying
15 the issuance of the injunction." (Local No. 83,
16 Construction Drivers Union v. Jenkins, 308 F.2d
17 516, 517 (9th Cir. 1962).

18 Thus, the District Court need not find that there
19 is a probability that the National Labor Relations Board
20 will resolve disputed questions of fact in favor of the
21 petitioner, but merely that there is sufficient evidence
22 from which the Board could find a violation of law.

23 "The phrases 'reasonable cause' or
24 'reasonable grounds' are standard in law.
25 Their meaning, when made a conclusion for
26 action, has long been established. The



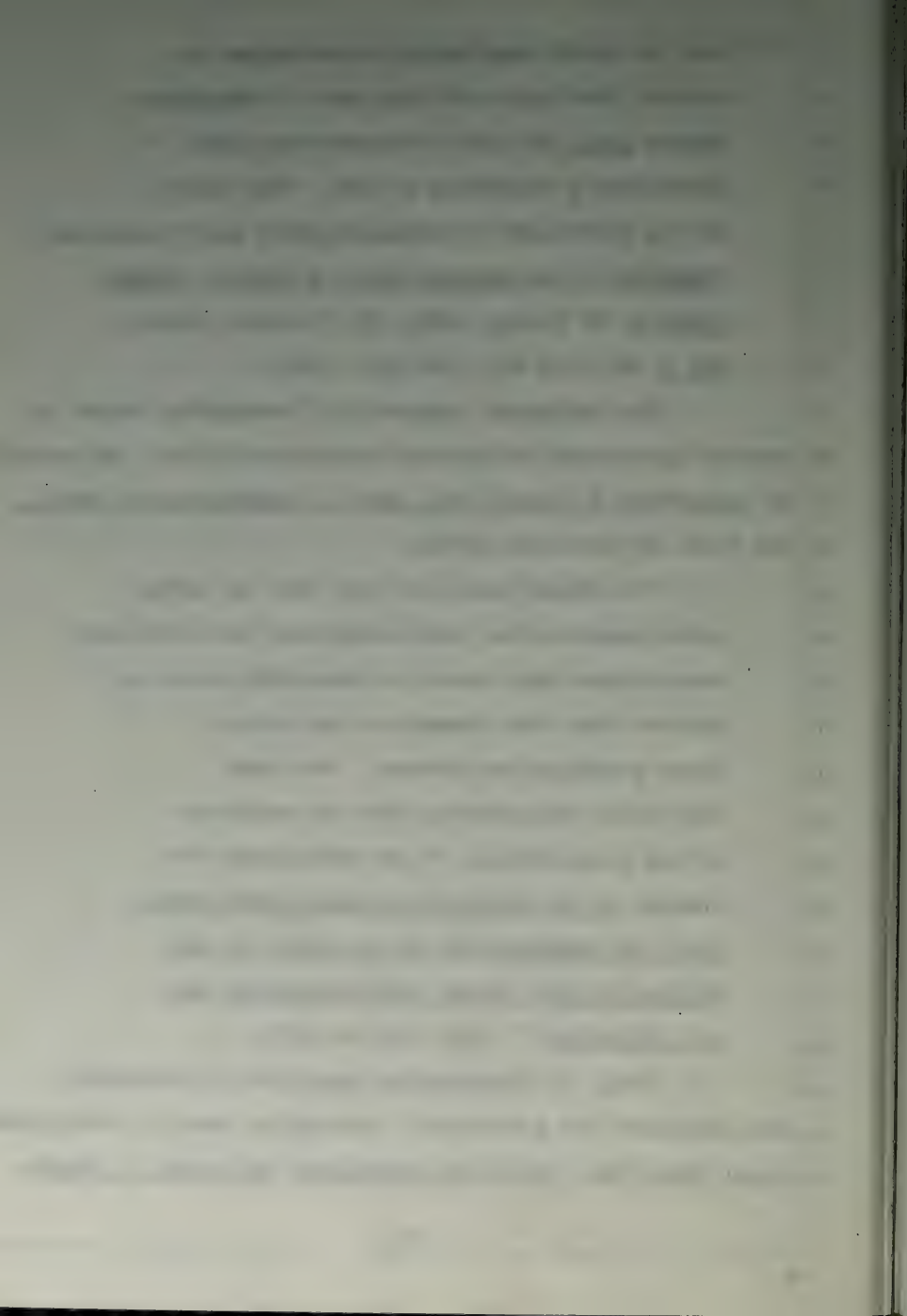
1 test by which compliance is determined is
2 whether the facts are such that a reasonable
3 person could be led to believe that they
4 constitute a violation of law. They need
5 not be sufficient to actually prove such violation."

6 (LeBaron v. Los Angeles Bldg. & Constr. Trades
7 Council, 84 F.Supp. 629, 635 (S.D.Cal. 1949),
8 aff'd 185 F.2d 405 (9th Cir. 1950).

9 The statutory standard of "reasonable cause" is
10 equally applicable to disputed questions of law. As stated
11 in Schauffler v. Local 1291, Int'l. Longshoremen's Ass'n.,
12 292 F.2d 182 (3rd Cir. 1961):

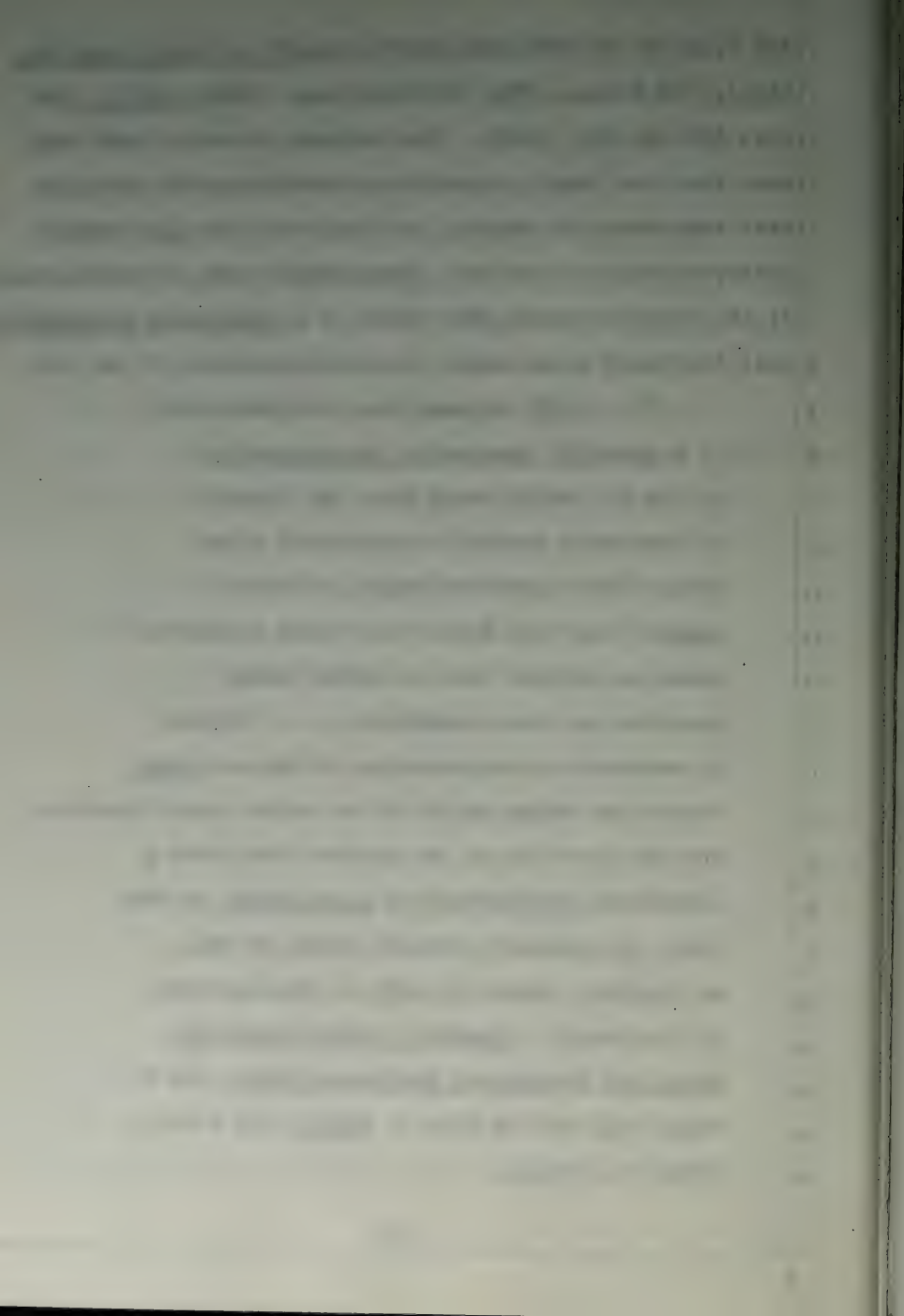
13 "The Board need not show that an unfair
14 labor practice has been committed, but need only
15 demonstrate that there is reasonable cause to
16 believe that the elements of an unfair
17 labor practice are present. Nor need
18 the Board conclusively show the validity
19 of the propositions of law underlying its
20 charge; it is required to demonstrate merely
21 that the propositions of law which it has
22 applied to the charge are substantial and
23 not frivolous." (292 F.2d at 187).

24 Thus, if "substantial questions of statutory
25 determination are presented", reasonable cause is established
26 Local Joint Bd., Hotel and Restaurant Employees v. Sperry,



1 323 F.2d 75, 77 (8th Cir. 1963); Semoff v. Local Union No.
2 542-A, 238 F.Supp. 376, 382 (M.D.Penn. 1964), aff'd, 341
3 F.2d 589 (3d Cir. 1965). The Regional Director need only
4 show that the legal propositions underlying his petition
5 have some basis in reason, not that they are the correct
6 interpretation of the Act. Reasonable cause is established
7 if the Director shows that there is a reasonable possibility
8 that the Board might adopt his interpretation of the Act.

9 " . . . [I]t appears that the existence
10 of a possible reasonable interpretation
11 of the Act which would make the conduct
12 of the union subject to complaint of an
13 unfair labor practice would, of itself,
14 suggest that the Board would have reasonable
15 cause to believe that an unfair labor
16 practice has been committed. . . . [W]here
17 a reasonable interpretation of the Act might
18 render the union guilty of an unfair labor practice,
19 and the Court is of the opinion that such a
20 reasonable interpretation might exist in this
21 case, the ultimate issues, legal as well
22 as factual, should be left to the decision
23 of the Board. (Sperry v. Local Joint Bd.
24 Hotel and Restaurant Employees Union, 216 F.
25 Supp. 263, 266 (W.D.Mo.), aff'd, 323 F.2d 75
26 (8th Cir. 1963)).



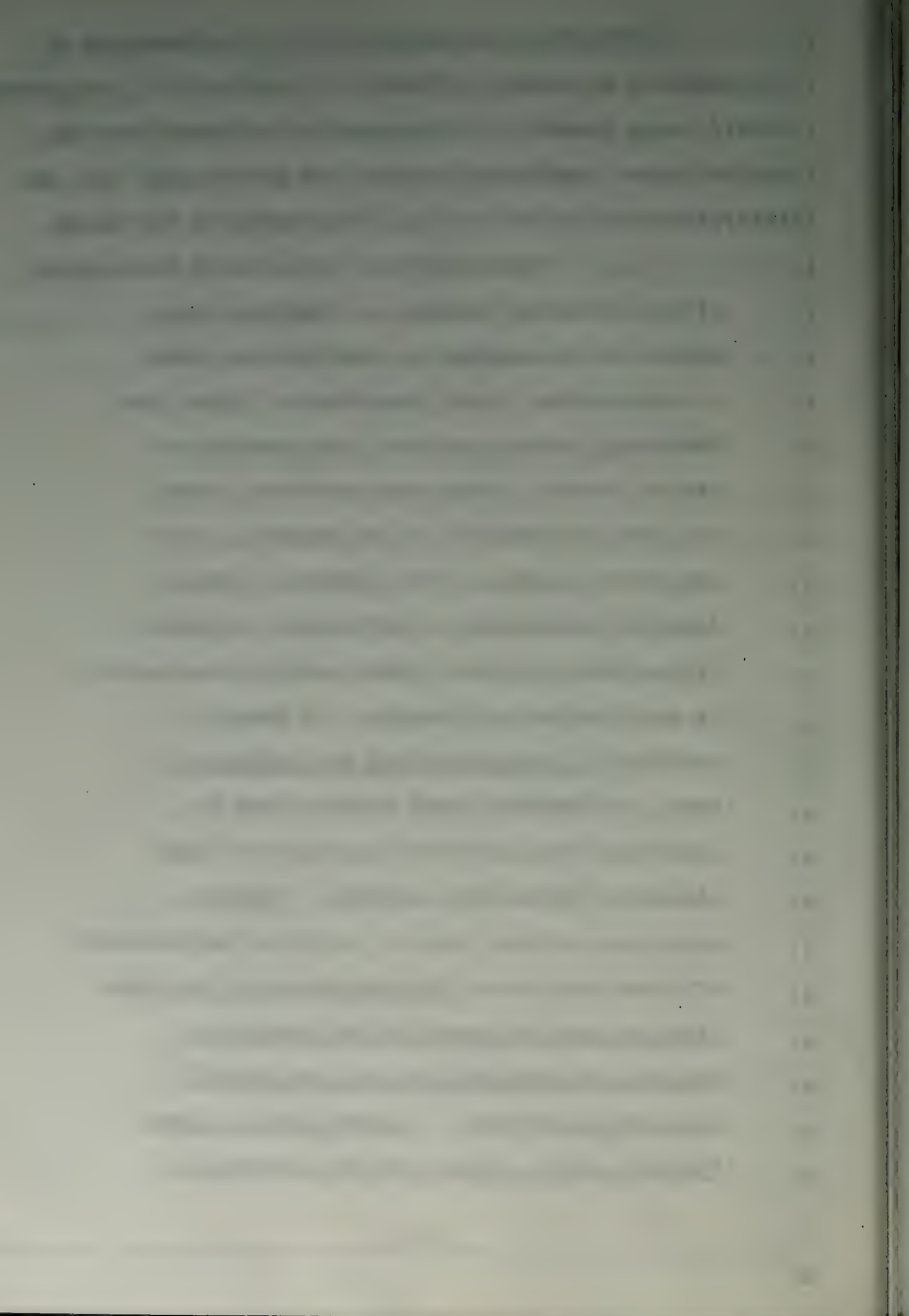
1 Even where the proposition of law advanced by
2 the Regional Director is "novel", a Section 10(1) injunction
3 should issue unless the inferences to be drawn from the
4 decided cases completely exclude the possibility that his
5 interpretation of the Act will be adopted by the Board.

6 ". . . [T]he Board is 'the primary interpreter
7 of the statutory scheme', a function which
8 should not be usurped by the District Court
9 in determining 'novel questions of labor law'.

10 Obviously, where, as here, the question of
11 law is 'novel', this Court perforce does
12 not have the benefit of the Board's, or of
13 any other, opinion. The statutory scheme
14 does not contemplate a definitive decision
15 by the District Court under such circumstances.

16 We must decide only whether the Board's
17 position is reasonable and not frivolous.

18 Here, the Board's legal position may be
19 uncertain when tested by appropriate legal
20 standards [Citations omitted]. However,
21 we do not believe that it is either unreasonable
22 or frivolous, since the inferences to be drawn
23 from the decided cases do not completely
24 exclude the possibility that the Board's
25 position is correct." (Schauffler v. Local
26 No. 677, Int'l. Union, United Automobile,



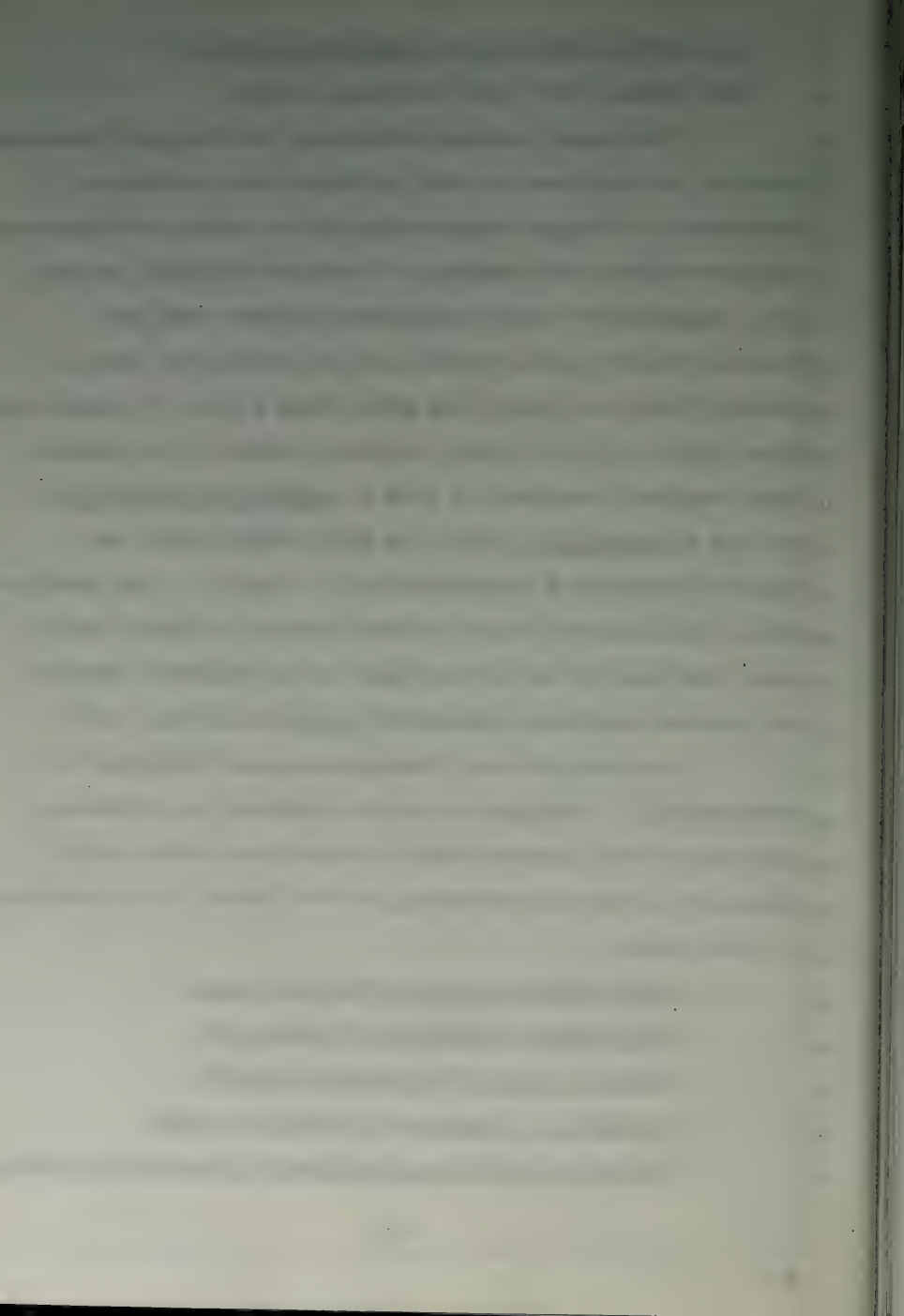
1 Aircraft & Agricultural Implement Workers,

2 201 F.Supp. 637, 638 (E.D.Penn. 1961).

3 The legal premise underlying the Regional Director's
4 petition in this case is that different and autonomous
5 divisions of a single corporation may be considered separate
6 employers within the meaning of Section 8(b)(4)(B) of the
7 Act. Appellants' brief incorrectly assumes that the
8 District Court's order herein must be predicated upon a
9 finding "that the Board will adopt such a rule." (Appellants'
10 Brief, pp. 8, 11). To the contrary, however, the District
11 Court was only required to find a reasonable possibility,
12 and not a probability, that the Board would adopt the
13 Regional Director's interpretation of the Act. The question
14 before the District Court was not whether the Board would
15 adopt the rule of law relied upon by the Regional Director
16 but whether the Board reasonably could adopt that rule.

17 So much for the "reasonable cause" standard of
18 Section 10(1). We turn now to the related, but distinct,
19 question of the limited scope of Appellate review which
20 results in a further narrowing of the issues to be considered
21 by this Court.

22 B. Upon Appeal From An Order Granting A
23 Preliminary Injunction Pursuant To
24 Section 10(1). The District Court's
25 Finding Of "Reasonable Cause" Will Not
26 Be Set Aside Unless The Same Is Clearly Erroneous.

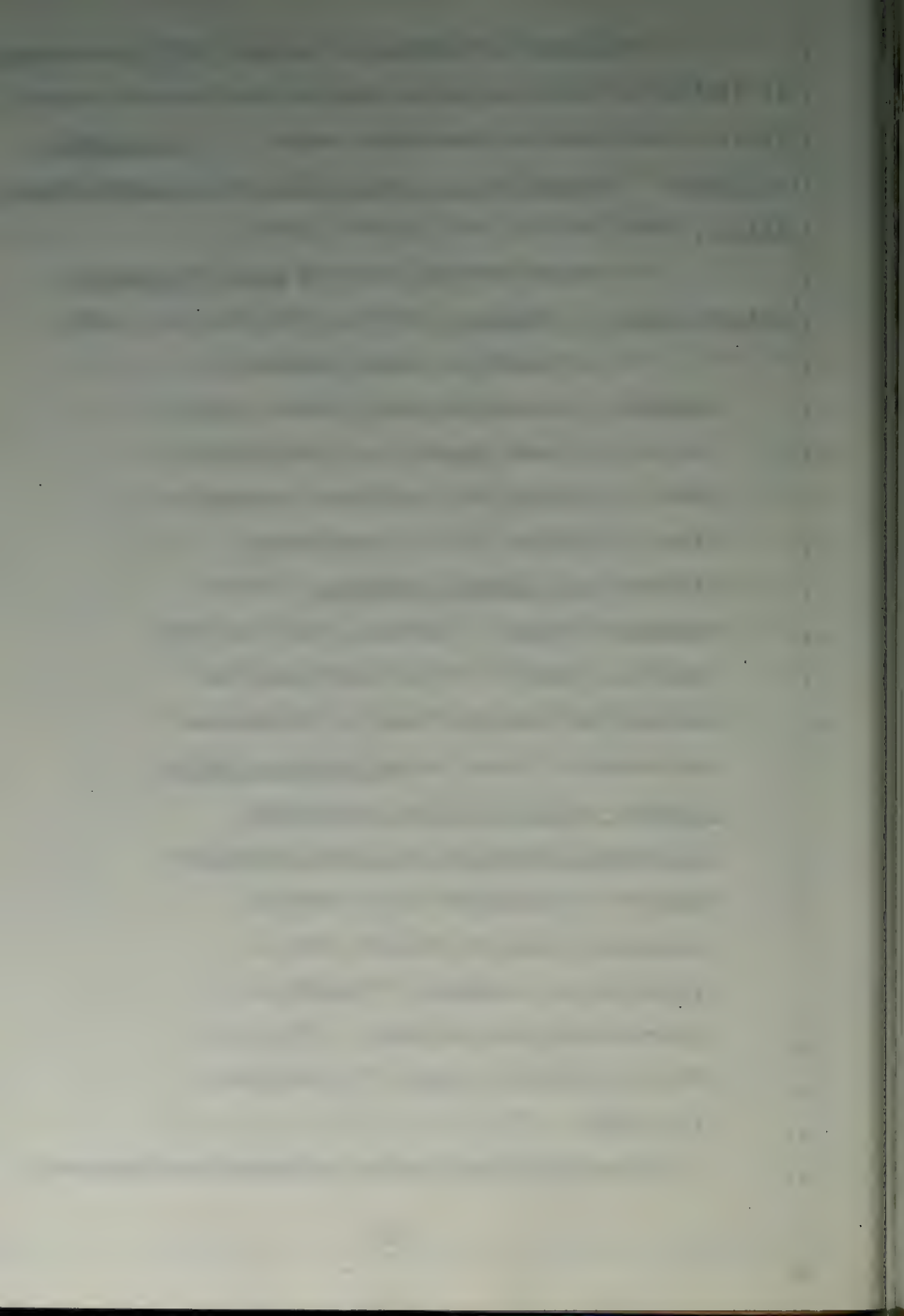


1 "The scope of review of Section 10(1) proceedings
2 is limited to a determination whether the district court's
3 finding that there is reasonable cause . . . is clearly
4 erroneous." Schauffler v. Local 1291, Int'l. Longshoremen's
5 Ass'n., 292 F.2d 182, 187 (3d Cir. 1961).

6 As stated by this court in Local 83, Constr.
7 Drivers Union v. Jenkins, 308 F.2d 516 (9th Cir. 1962):

8 "To set aside an order granting a
9 temporary injunction under Section 10(1) of
10 the Act, it must appear that the District
11 Court's finding that there was reasonable
12 cause to believe the Act was being
13 violated was clearly erroneous. Ware-
14 housemen's Union v. Hoffman, 302 F.2d 352
15 (9th Cir. 1962). 'It is sufficient to
16 sustain the District Court's finding and
17 conclusion if there be any evidence which
18 together with all of the reasonable
19 inferences that might be drawn therefrom
20 supports a conclusion that there is
21 reasonable cause to believe that a
22 violation has occurred.' Madden v.
23 International Hod Carriers, 277 F.2d
24 688, 692 (7th Cir. 1960)." (308 F.2d
25 at 517-18).

26 This Court has clearly differentiated between



1 the very limited scope of appellate review when an
2 injunction is granted, and the broader scope of review
3 when an injunction is denied, stating that this difference
4 is justified "Because of the Congressional policy favoring
5 the granting of temporary injunctions under Section 10(1)
6 of the Act" Local 83, Constr. Drivers Union v.
7 Jenkins, supra, 308 F.2d at 517, n.1. Thus, the question
8 presented on this appeal is merely whether there is any
9 substantial evidence in the record supporting the District
10 Court's finding of "reasonable cause". This Court's
11 function is that of "simply reviewing discretion exercised
12 below in a § 10(1) setting." Madden v. International
13 Organization of Masters, Mates & Pilots, 259 F.2d 312, 313,
14 cert. denied, 358 U.S. 909 (1958).

15 The very limited scope of review of an order
16 granting a preliminary injunction in a Section 10(1) proceed-
17 ing had been recognized not only by this Court but by other
18 courts of appeal. As stated by the Court of Appeals for the
19 Sixth Circuit in American Federation of Radio & Television
20 Artists v. Getreu, 358 F.2d 698 (1958):

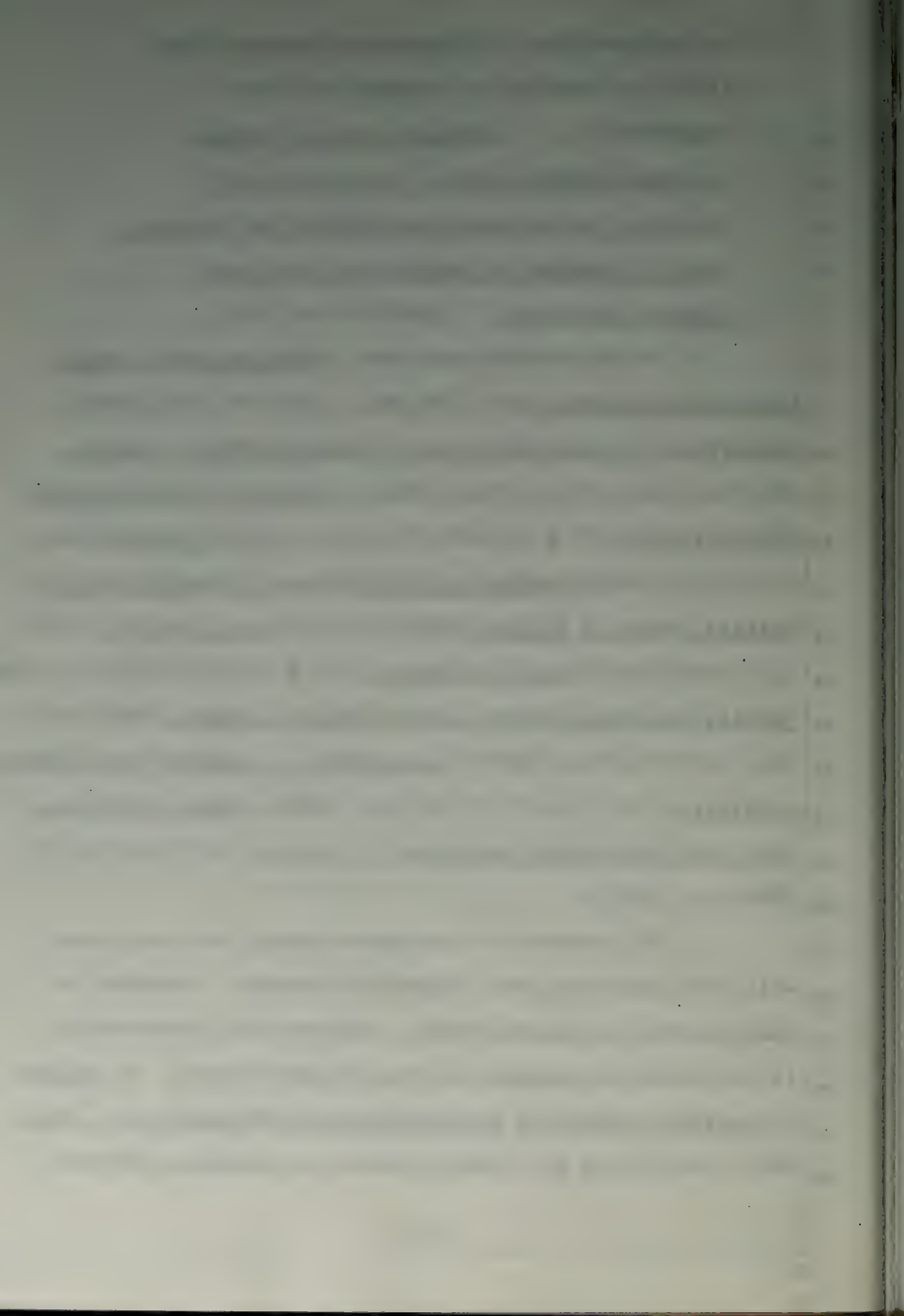
21 "At the outset we emphasized the
22 limited scope of our function on this
23 appeal. Section 10(1) of the Act requires
24 that the district judge, as a prerequisite
25 for the issuance of a temporary injunction,
26 need only find that there is reasonable cause

1	2	3	4	5	6	7	8	9	10	11	12	13	14	15	16	17	18	19	20	21	22	23	24	25	26	27	28	29	30	31	32	33	34	35	36	37	38	39	40	41	42	43	44	45	46	47	48	49	50	51	52	53	54	55	56	57	58	59	60	61	62	63	64	65	66	67	68	69	70	71	72	73	74	75	76	77	78	79	80	81	82	83	84	85	86	87	88	89	90	91	92	93	94	95	96	97	98	99	100
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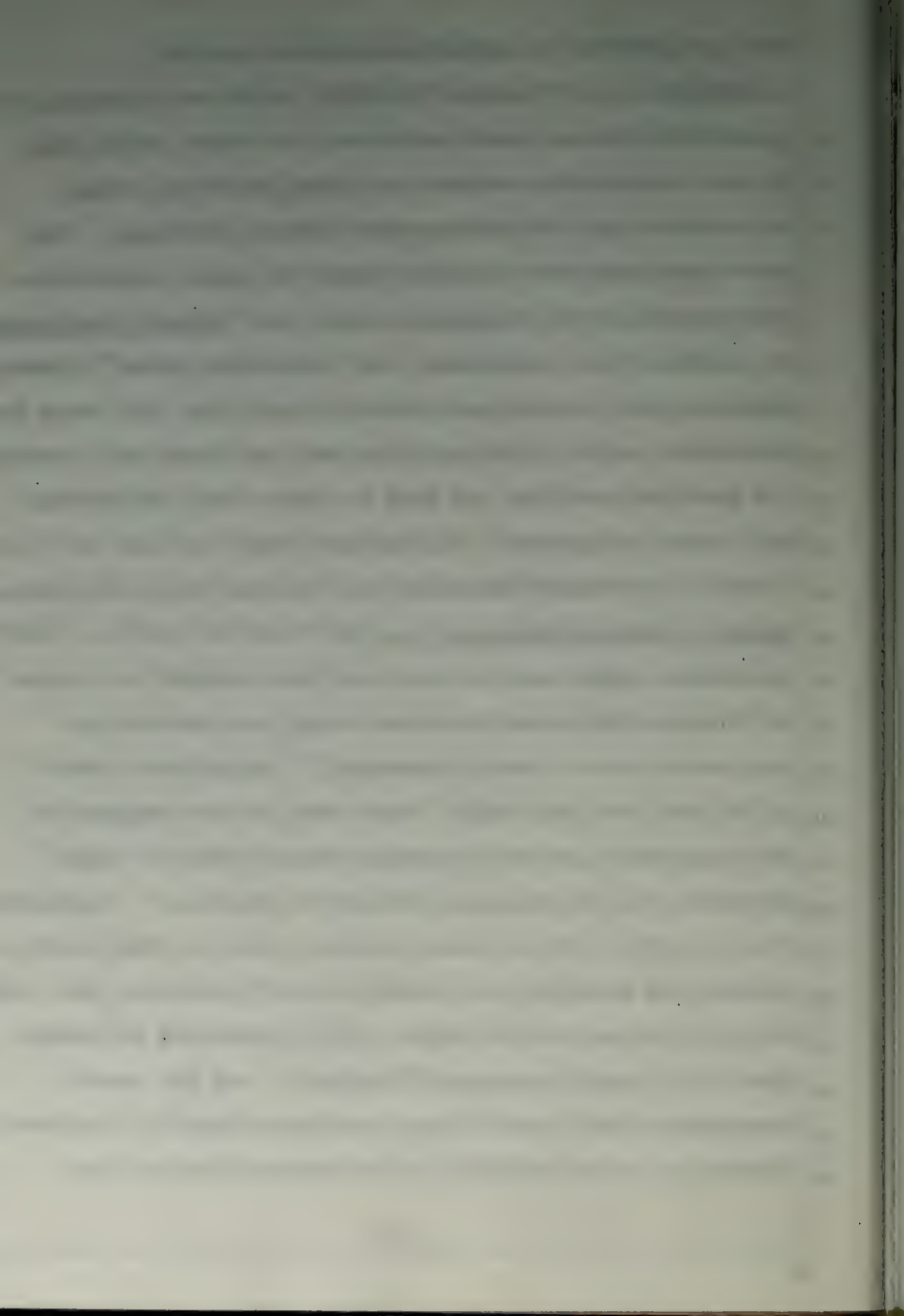
1 to believe that a violation of Section 8(b)
2 (4)(A) of the Act as charged has been
3 committed. . . . Review here is further
4 confined by Rule 52(a), F.R.Civ.P., 28
5 U.S.C.A., to determining whether the district
6 court's finding of reasonable cause was
7 clearly erroneous." (258 F.2d at 699).

8 To the same effect are: Warehousemen's Union
9 Local 6 v. Hoffman, 302 F.2d 352, 354 (9th Cir. 1962);
10 Schauffler v. Local 1291, Int'l. Longshoremen's Ass'n.,
11 292 F.2d 182, 187 (3d Cir. 1961); Madden v. International
12 Hod Carriers, 277 F.2d 688 (7th Cir.), cert. denied, 364
13 U.S. 863 (1960); Madden v. International Organization of
14 Masters, Mates & Pilots, 259 F.2d 312, cert. denied, 358
15 U.S. 909 (1958); Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967)
16 Retail, Wholesale & Dept. Store Union v. Rains, 266 F.2d
17 503, 506 (5th Cir. 1959); Schauffler v. Highway Truck Drivers
18 & Helpers, 230 F.2d 7, 9 (3d Cir. 1956); Local Joint Bd.,
19 Hotel and Restaurant Employees v. Sperry, 323 F.2d 75, 77
20 (8th Cir. 1963).

21 In contrast to the above cases, the only court
22 which has held that the "clearly erroneous" standard is
23 inapplicable to appeals from a Section 10(1) proceeding
24 is the Court of Appeals for the Second Circuit. In McLeod
25 v. Business Machine & Office Appliance Machines Conf. Bd.,
26 300 F.2d 237 (2d Cir. 1962), where the Regional Director



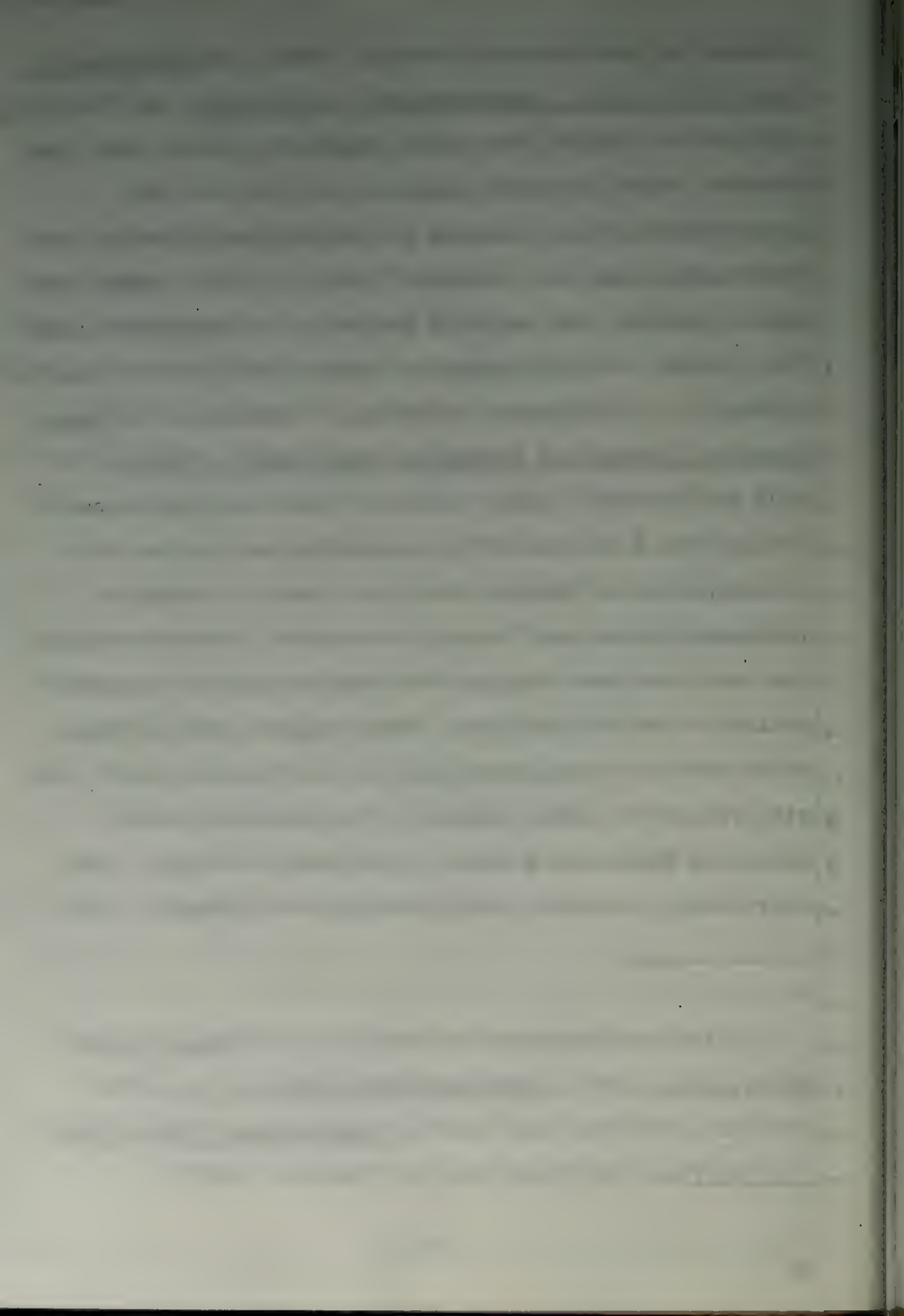
1 had been granted an injunction premised upon an
2 interpretation of Section 8(b)(4)(B) which was clearly pre-
3 cluded by previous Board decisions, the court stated that
4 it need decide only whether the judge below was wrong,
5 not whether his conclusions were clearly erroneous. The
6 Court concluded that in cases where the legal propositions
7 relied upon by the Regional Director are "clearly precluded"
8 by previous Board decisions, the "reasonable cause" standard
9 requires that the Regional Director must show that there is
10 reasonable cause to believe both that the Board will reverse
11 its previous position and that its order will be enforced
12 by a court of appeals. Relying upon this case and the Second
13 Circuit's subsequent decision in a Section 10(j) proceeding,
14 McLeod v. General Electric Co., 366 F.2d 847 (2d Cir. 1966),
15 Appellants argue that in this case the standard for review
16 is "whether the judge below was wrong, not whether his
17 conclusions were clearly erroneous," (Appellants' Brief
18 p. 24) and that this Court "must make its own analysis of
19 the applicable law and determine whether there is legal
20 precedent for the Regional Director's position." (Appellants'
21 Brief, p. 29). It is clear, however, that no other court of
22 appeals has accepted the Second Circuit's position that the
23 scope of review from a Section 10(l) proceeding is broader
24 than the "clearly erroneous" standard. And the cases
25 demonstrate that this is true even where there is substantial
26 dispute as to the validity of the propositions of law



1 advanced by the Regional Director. Thus, in Schauffler v.
2 Local 1291, Int'l. Longshoremen's Association, 292 F.2d 182,
3 187 (3d Cir. 1961)*, the court explicitly stated that the
4 district court is merely required to find that the
5 propositions of law advanced by the Regional Director are
6 "substantial and not frivolous", and that upon appeal from
7 such a finding, the scope of review by the appellate court
8 "is limited to a determination whether the district court's
9 finding . . . is clearly erroneous." Similarly, in Local
10 Joint Bd., Hotel and Restaurant Employees v. Sperry, 323
11 F.2d 75 (8th Cir. 1963), the court held that the scope of
12 review from a Section 10(1) proceeding was limited to a
13 determination of whether the trial court's finding of
14 reasonable cause was "clearly erroneous", notwithstanding
15 the fact that such finding was premised upon an interpre-
16 tation of the Act involving "many complex legal problems
17 which have not been passed upon by the Supreme Court" and
18 with respect to which members of the National Labor
19 Relations Board had divided in previous decisions. The
20 court made clear that its discussion with respect to the

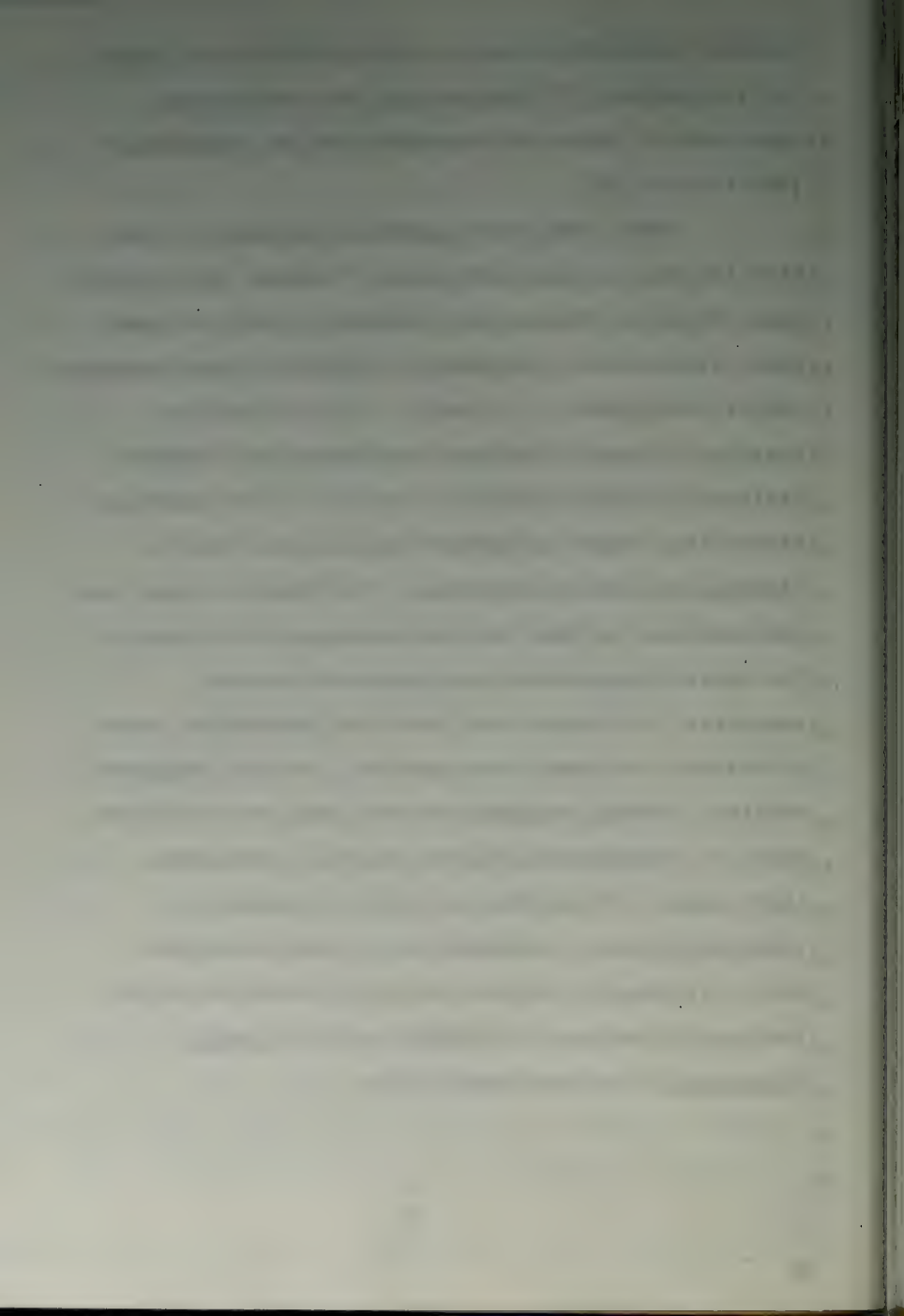
21
22 *

23 Cited with approval by this court in Retail Clerks
24 Union, Local 137 v. Food Employers Council, Inc., 351
25 F.2d 525, 531 (9th Cir. 1965); Warehousemen's Union Local
26 6 v. Hoffman, 302 F.2d 352, 353 (9th Cir. 1962).



1 disputed issue of statutory interpretation was "only
2 for the purpose of illustrating that substantial
3 questions of statutory determination are presented."
4 (323 F.2d at 77).

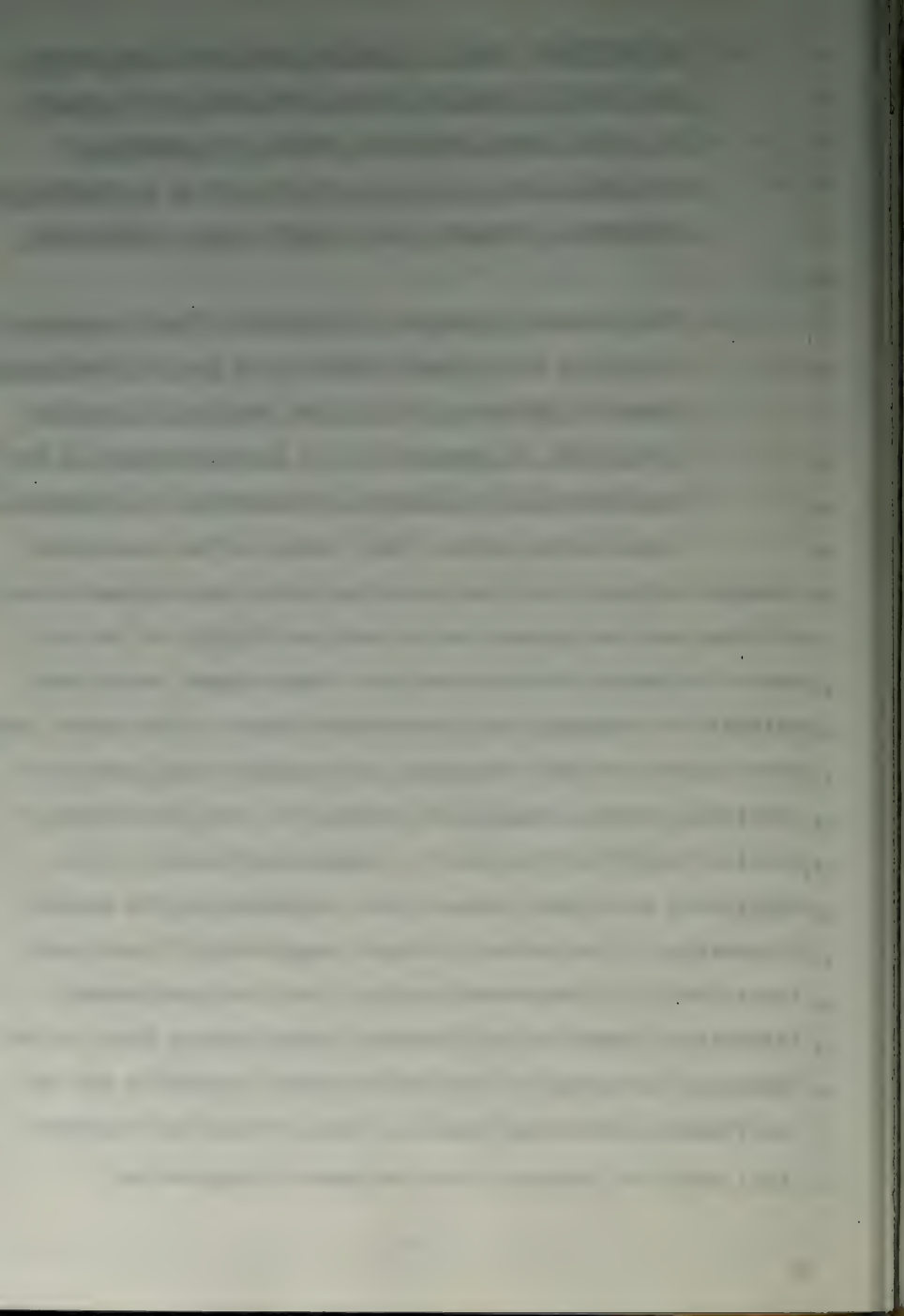
5 Thus, the first question presented in this
6 case is not, as Appellants urge, "whether the district
7 court erred in finding and concluding that the news-
8 paper divisions of The Hearst Corporation were genuinely
9 neutral employers . . . and . . . that there is
10 reasonable cause to believe appellants had violated
11 Section 8(b)(4)(1)(11)(B) of the Act". The question
12 before this Court is whether the District Court's
13 finding was clearly erroneous. The District Court was
14 not required to find that the newspaper divisions of
15 The Hearst Corporation were genuinely neutral
16 employers. It found that there was reasonable cause
17 to believe that they were genuinely neutral employers,
18 and this finding required no more than the establish-
19 ment of a substantial factual question concerning
20 that issue. If the District Court's finding of
21 reasonable cause, predicated as it must have been
22 upon a finding of factual and legal issues which are
23 substantial and not frivolous, was not clearly
24 erroneous, this Court must affirm.



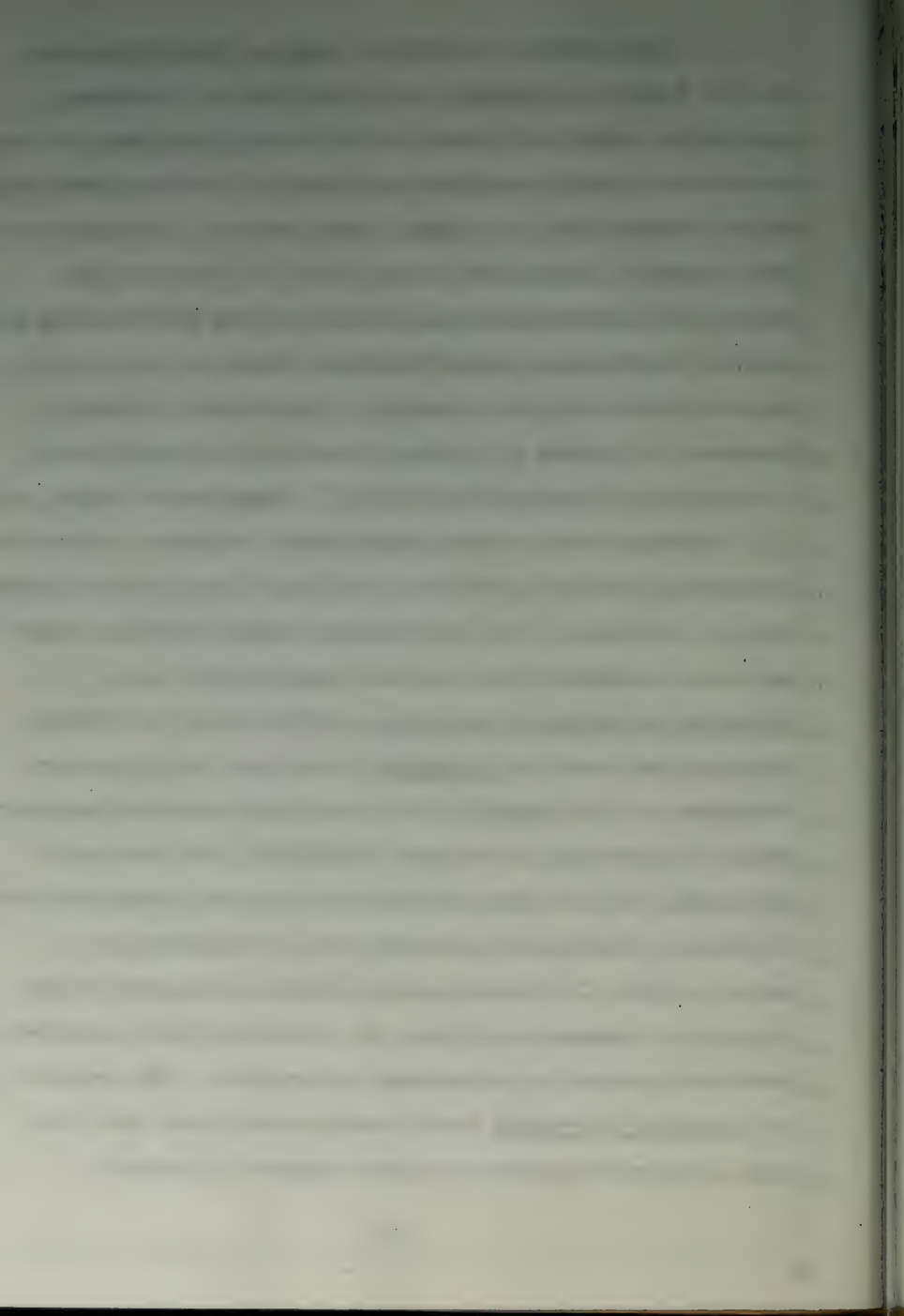
1 II. THE DISTRICT COURT'S FINDING THAT THERE WAS REASON-
2 ABLE CAUSE TO BELIEVE THAT APPELLANTS HAVE ENGAGED
3 IN UNFAIR LABOR PRACTICES WITHIN THE MEANING OF
4 SECTION 8(b)(4)(1)(11)(B) OF THE ACT IS SUPPORTED BY
5 SUBSTANTIAL EVIDENCE AND IS NOT CLEARLY ERRONEOUS.

6
7 A. The Regional Director's Contention That Autonomous
8 Divisions Of A Single Corporation Can Be Considered
9 Separate Employers Within The Meaning Of Section
10 8(b)(4)(B) Is Premised On An Interpretation Of The
11 Act Which Is Not Clearly Unreasonable Or Privolous.

12 Appellants contend that there is "no reasonable
13 cause to believe that the picketing under the circumstances
14 of this case was proscribed by Section 8(b)(4) of the Act,
15 since The Hearst Corporation is a single legal entity and
16 neither the National Labor Relations Board or the courts have
17 ever found different divisions of a single legal entity to
18 constitute neutral employers entitled to the protection of
19 Section 8(b)(4) of the Act." (Appellants' Brief, p. 6).
20 Appellants have thus focused their argument on The Hearst
21 Corporation's status as a "single legal entity", and have
22 almost wholly disregarded the fact that the preliminary
23 injunction issued by the District Court relates also to the
24 secondary picketing of the San Francisco Chronicle and the
25 San Francisco Printing Company, both of whom are separate
26 legal entitles distinct from The Hearst Corporation.



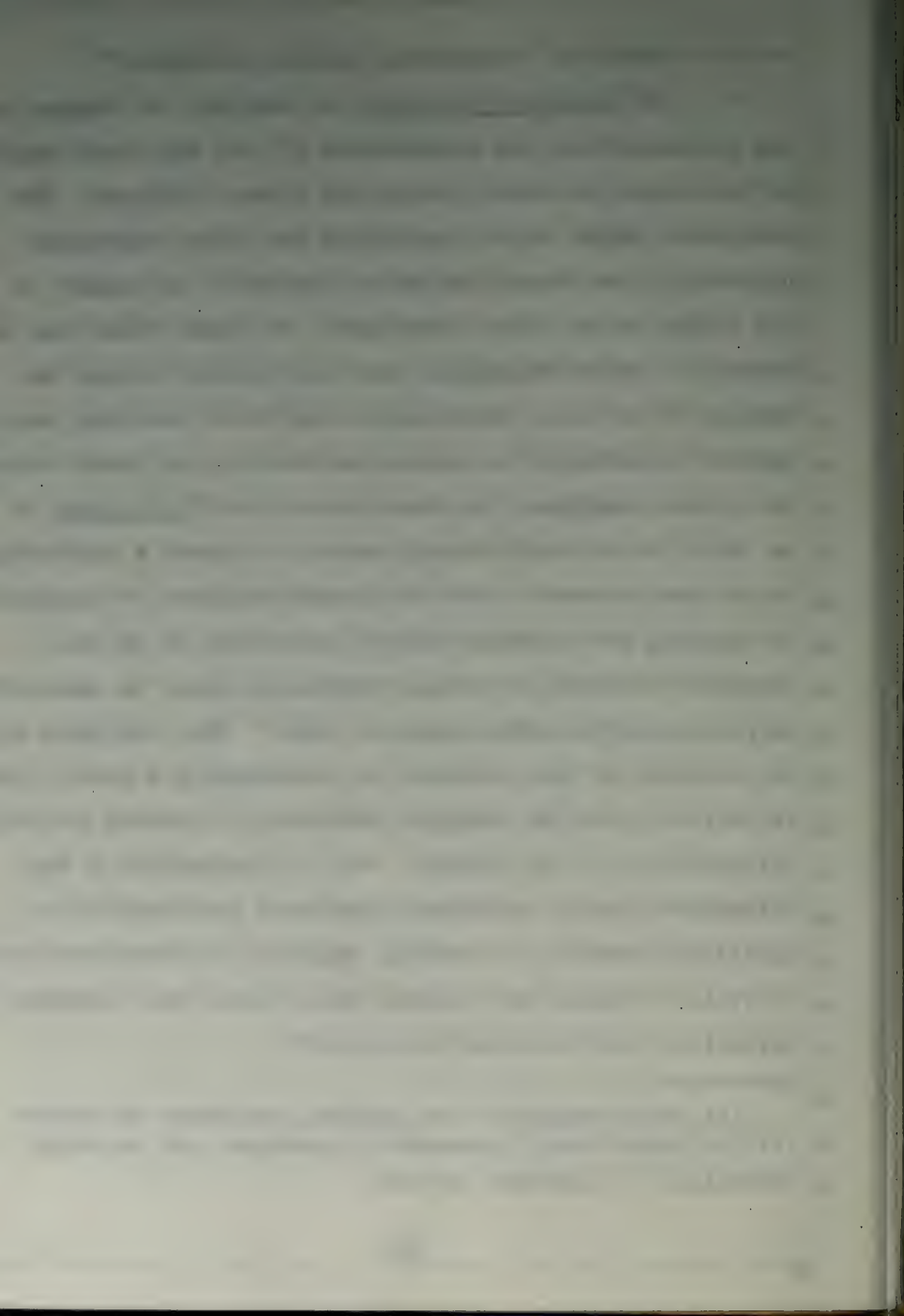
1 With respect to the Los Angeles Herald-Examiner,
2 the San Francisco Examiner, and other Hearst divisions,
3 Appellants argue that these various enterprises must all be
4 considered a single employer by virtue of the fact that The
5 Hearst Corporation is a single legal entity. In support of
6 this argument, Appellants stress that "in the more than
7 twenty-year period since the passage of the Taft-Hartley Act,
8 neither the National Labor Relations Board nor any court
9 has ever held that the picketing of different divisions,
10 branches, or stores of a single legal entity constitutes
11 a violation of Section 8(b)(4)(B)." (Appellants' Brief, p.
12 8). Although this is true, Appellants' reliance on this bit
13 of history does not prove that the legal issue here in ques-
14 tion is frivolous. For the National Labor Relations Board
15 has only considered this precise issue in one case,
16 Alexander Warehouse & Sales Co., 128 N.L.R.B. 916 (1960).
17 Although the Board in Alexander found that the corporate
18 divisions in that case did not constitute separate employers
19 within the meaning of Section 8(b)(4)(B), the Board sig-
20 nificantly did not base its decision upon an interpretation
21 of the Act which would preclude such a conclusion as a
22 matter of law. It focused upon a detailed analysis of the
23 facts which demonstrated that the divisions there involved
24 were not operated as autonomous enterprises. The decision
25 in Alexander Warehouse thus clearly establishes that the
26 legal proposition underlying the Regional Director's



petition herein is "substantial and not frivolous."

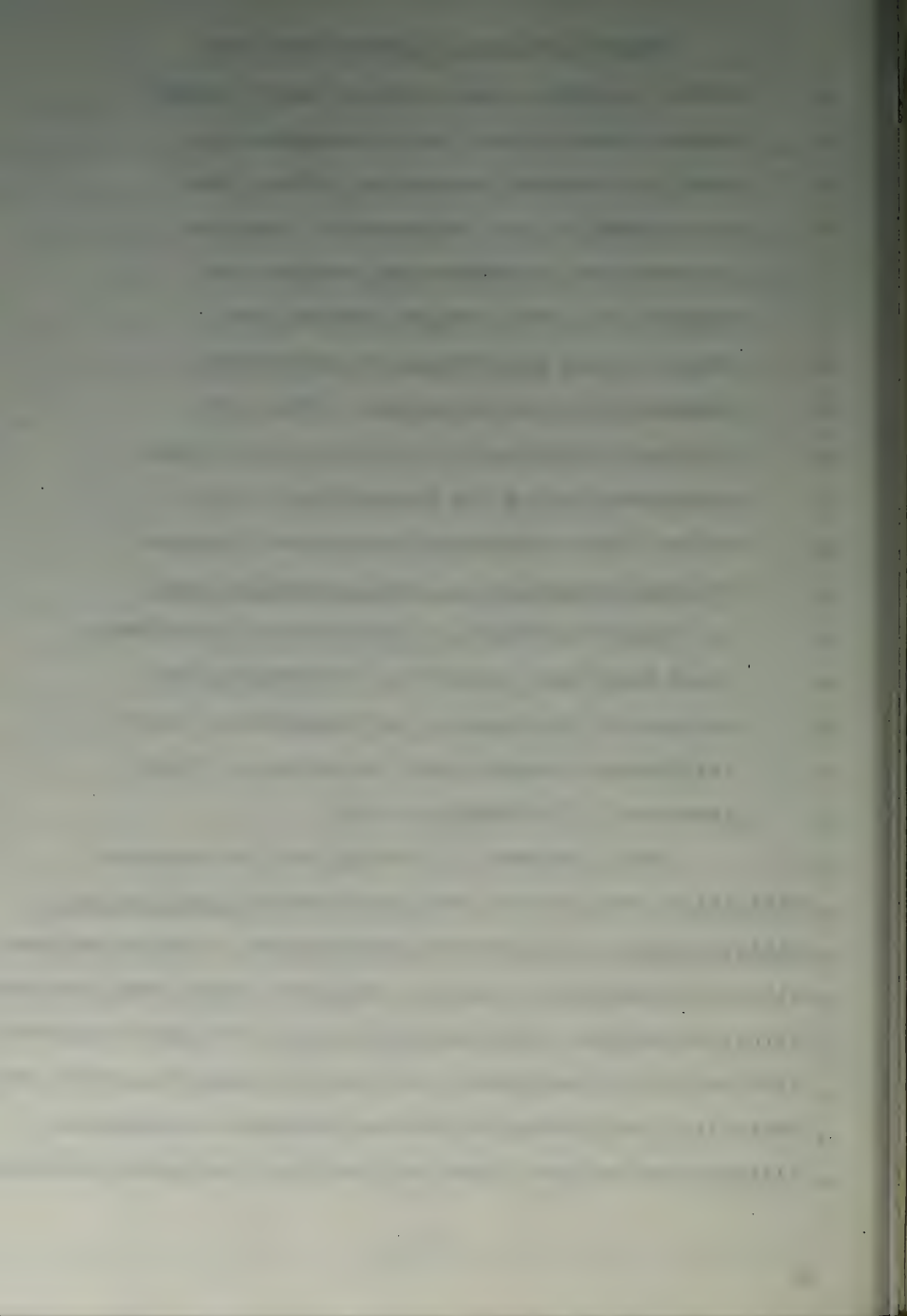
In Alexander Warehouse the employer was engaged in the purchase, sale and distribution of coal and other supplies at warehouses in Joliet, Peoria and Urbana, Illinois. The respondent union, which represented the Joliet employees, picketed at the Urbana and Peoria warehouses in support of its strike at the Joliet warehouse. The Board found that the Urbana and Peoria warehouses were non-neutrals within the meaning of the Act. Adverting to the "ally" doctrine, which permits picketing of an enterprise which allies itself with the primary employer, the Board stated that "a fortiori if an 'ally' is not sufficiently neutral to permit a distinction to be drawn between it and the primary employer for purposes of applying the secondary boycott provisions of the Act, Alexander's Peoria and Urbana warehouses cannot be regarded as premises of a neutral employer here." That the Board did not conceive of this statement as establishing a rule of law is manifest from the language immediately following the foregoing excerpt of its opinion. For, in explanation of why Alexander's Peoria and Urbana warehouses could not be regarded as premises of a neutral employer, the Board went on to state in detail the evidence which showed that Alexander's operations were centrally controlled*.

* At the threshold of its opinion, the Board had stated its conclusion that "Alexander's operations are centrally controlled." (128 NLRB at 916).



1 "Those premises, together with the
2 Joliet warehouse, are operated under common
3 general supervision; their purchases are
4 made by a central purchasing office; they
5 participate in pool shipments of supplies
6 in order that Alexander may receive the
7 benefits of lower freight charges; and
8 there is some interchange of inventories
9 between the three warehouses. Thus, the
10 continued operation of the Peoria and Urbana
11 warehouses during the Respondents' strike
12 at the Joliet warehouse constituted, because
13 of their proximity to, and integration with,
14 the Joliet warehouse, a factor which conceivably
15 could have been decisive in determining the
16 outcome of the dispute, and Respondents could
17 legitimately extend their picketing to those
18 premises." (128 NLRB at 919).

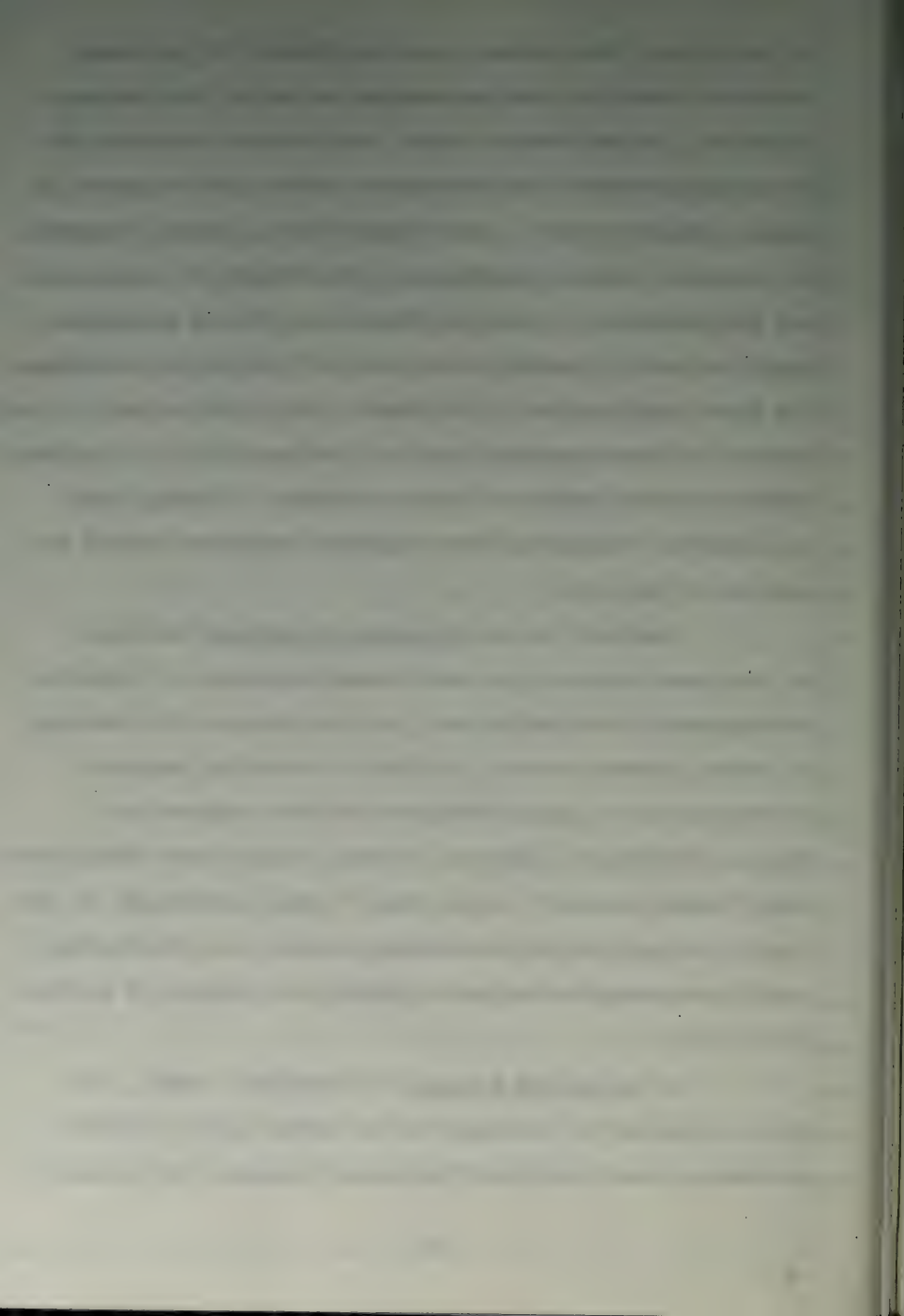
19 Thus, instead of holding that the separate
20 facilities owned by the same legal entity could not, as a
21 matter of law, be considered anything but a single employer
22 within the meaning of the Act, the Board found that the non-
23 struck warehouses were factually allied with and integrated
24 with the Joliet warehouse, and therefore, that they were not
25 neutrals. The finding of such an alliance or potential
26 alliance was not even based on the single corporate ownership



1 of the three. Nor, indeed, was this factor of fictional
2 corporate identity even enumerated as one of the relevant
3 criteria. In the Board's view, the relevant criteria for
4 determining whether the warehouses constituted separate or
5 single employers were: joint supervision, pooled shipments
6 of supplies, central purchasing, interchange of inventories
7 and the possibility that the Urbana and Peoria warehouses
8 might be used to handle struck work of the Joliet warehouse.
9 The clear implication of the Board's decision is that in the
10 absence of these various factors, the mere fact of fictional
11 corporate unity would not have precluded a finding that
12 the separate facilities were separate employers within the
13 meaning of the Act.

14 Implicit in the Alexander Warehouse decision
15 is the legal proposition that common ownership of separate
16 enterprises is not sufficient, in the absence of a showing
17 of actual common control, to justify treating separate
18 enterprises as a single employer for the purposes of
19 Section 8(b)(4)(B). Indeed, it has clearly been established
20 that "common control" rather than "common ownership" is the
21 test to be applied in determining whether two enterprises
22 constitute separate employers within the meaning of Section
23 8(b)(4)(B).

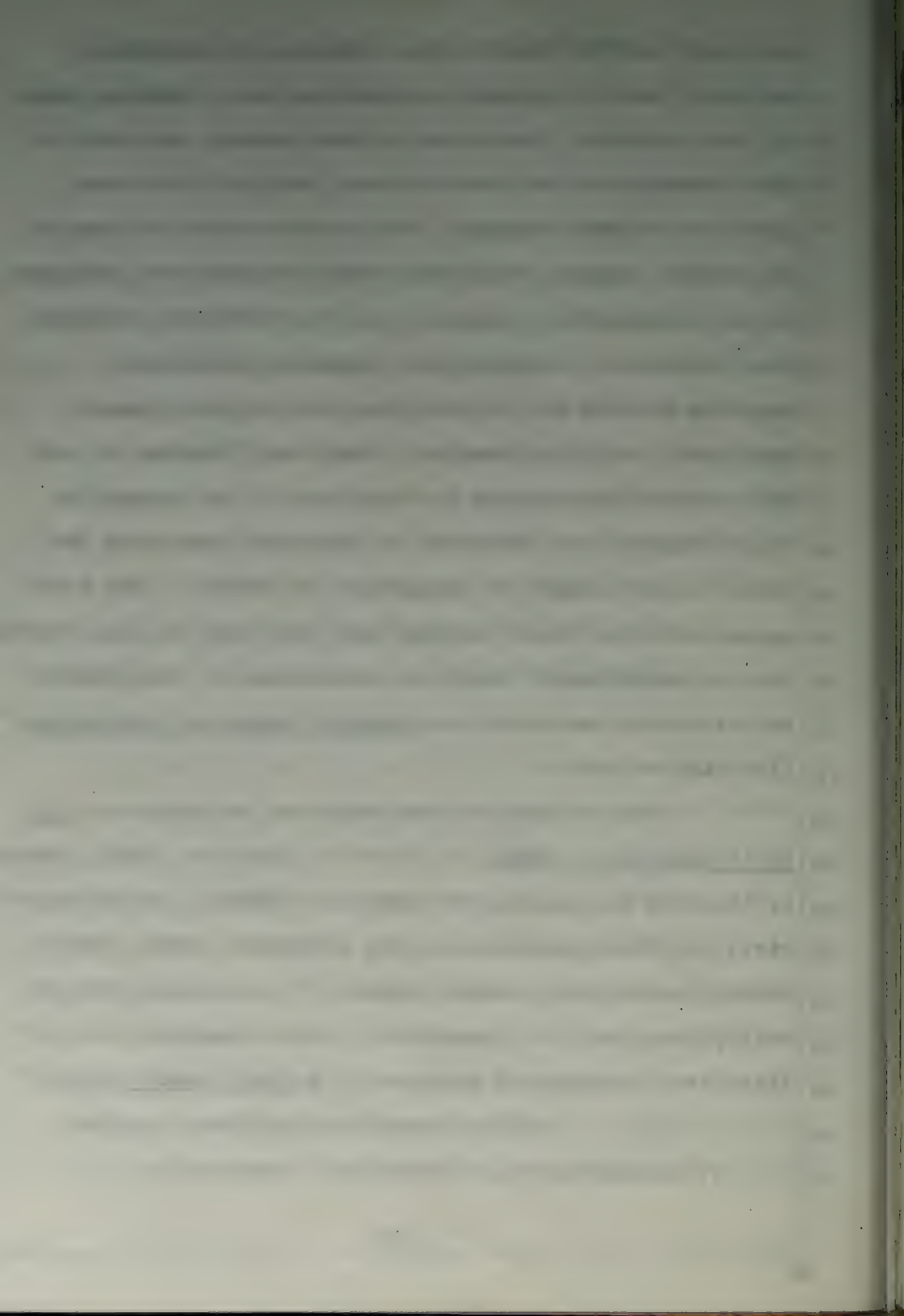
24 In J. G. Roy & Sons, 118 NLRB 286 (1957), the
25 facts presented to the Board in an unfair labor practice
26 proceeding disclosed that Roy Lumber Company, the primary



1 employer, and Roy Construction Company, the secondary
2 employer, each a separate corporation, were commonly owned
3 by five brothers. The stock of each company was held in
4 equal amounts by the five brothers, and all five were
5 directors of each company. Two brothers were officers of
6 the lumber company, while two other brothers were officers
7 of the construction company. All four officers received
8 equal salaries. Although the companies maintained
9 separate offices and records, and did not have common
10 employees, the trial examiner found that "whether or not
11 the brothers participate in decisions of the company in
12 which they are not officers, as directors they have the
13 power to participate in management decisions." The Board
14 agreed with the Trial Examiner and held that an ally relation-
15 ship is established "where the businesses of the primary
16 and secondary employers are commonly owned and controlled."
17 (118 NLRB at 288).

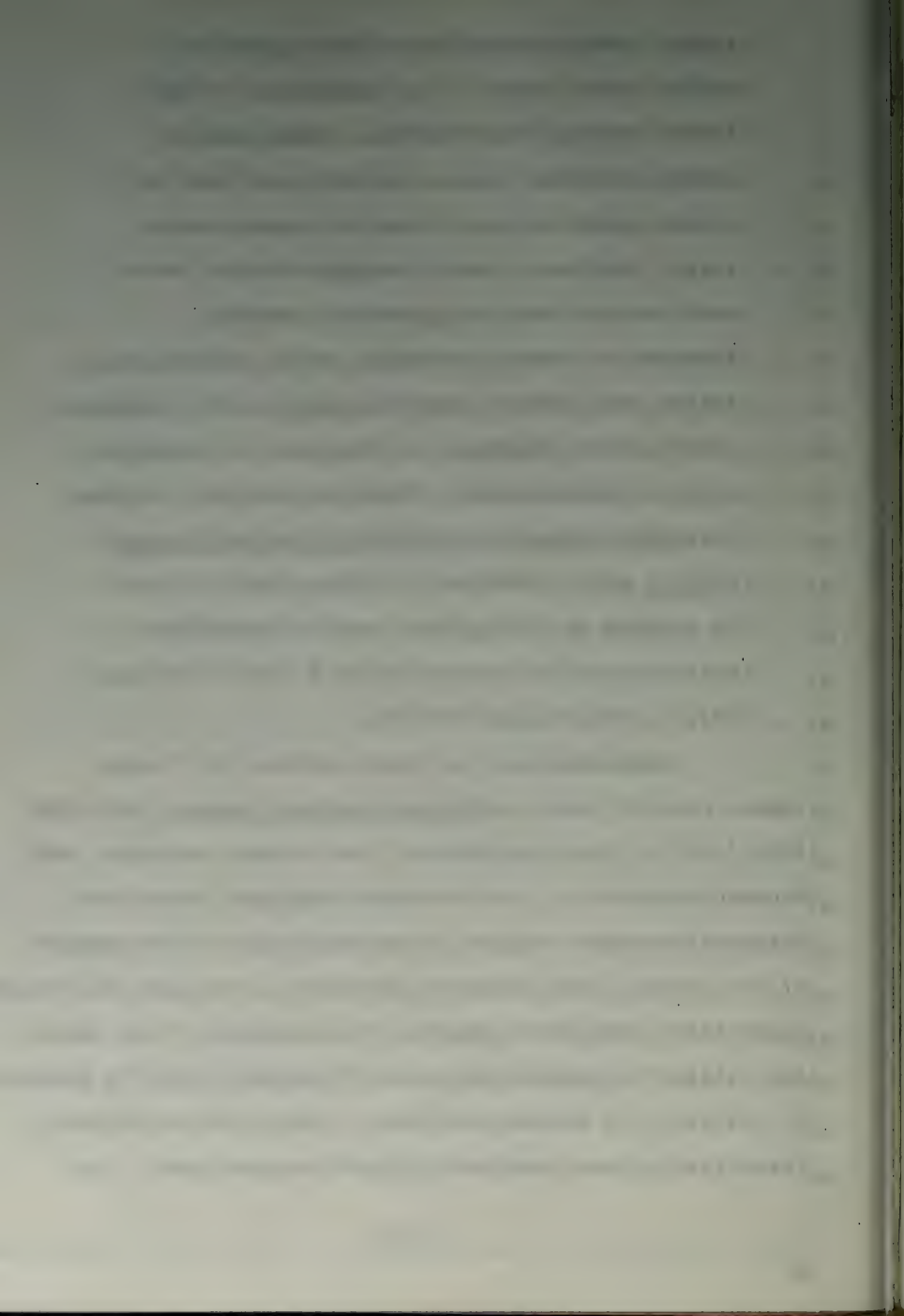
18 The decision of the Board was set aside in J.G.
19 Roy & Sons Co. v. NLRB, 251 F.2d 771 (1st Cir. 1958), adopted
20 by the NLRB on remand, 120 NLRB 1016 (1958). In the court's
21 view, the facts established only potential common control
22 rather than actual common control. It concluded that two
23 enterprises could be considered a single employer only if
24 there was "substantial evidence of actual common control":

25 ". . . [W]hile common ownership was admitted,
26 it was specifically found that there was no



1 actual common control over labor policies
2 or any other phase of the operations of Roy
3 Lumber and Roy Construction. There was of
4 course potential common control, but this is
5 always possible where there is common owner-
6 ship. The Board itself recognized that there
7 must be more than the potential control
8 inherent in common ownership for it specifically
9 stated that common ownership and [court's emphasis]
10 control were necessary in this case to establish
11 an ally relationship. There was entirely lacking
12 here any substantial evidence of actual common
13 control and, therefore, the Board was in error
14 in relying on this ground when it denied the
15 petition and the protection of § 8(b)(4)(A) and
16 (B)." (251 F.2d at 773-74).

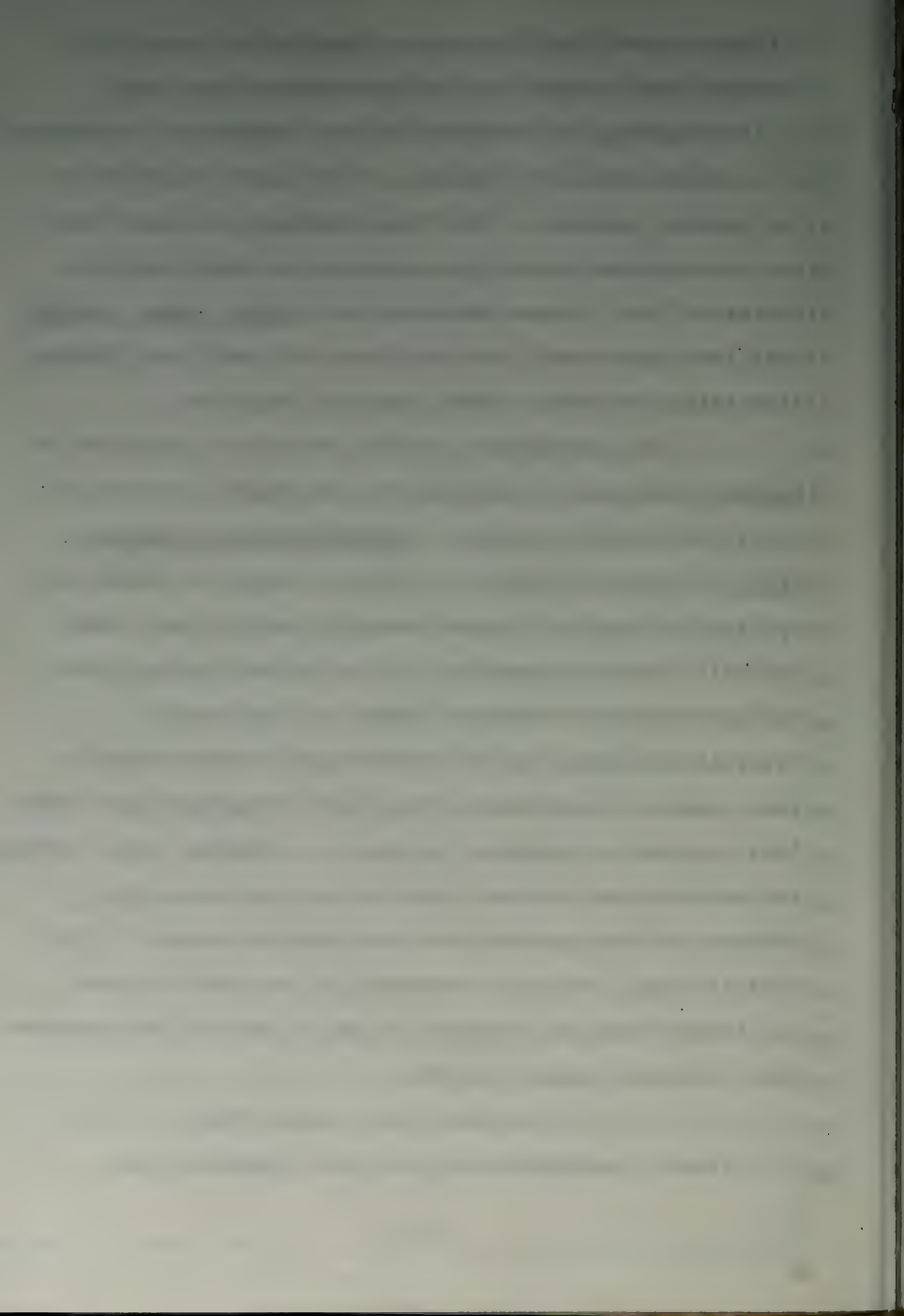
17 Subsequently, the Board applied the "actual
18 common control" test in Bachman Machine Company, 121 NLRB
19 1229 (1958). Plastics Molding, the primary employer, and
20 Bachman Machine Co., the secondary employer, were each
21 corporations whose capital stock was held by five members
22 of one family. The officers and boards of directors of each
23 corporation were drawn entirely from members of the family,
24 and William N. Bachman who owned 75 percent and 67.5 percent
25 of the stock of Bachman Machine Co. and Plastics Molding,
26 respectively, was president of both corporations. The



4 evidence showed that there was a substantial amount of
5 business done between the two corporations and that
6 William Bachman, as president of both companies, controlled
7 or participated in the control of the labor relations of
8 the primary employer. The Trial Examiner concluded that
9 both enterprises should be considered a single employer
10 because of the "common ownership and actual common control
11 over labor policies", and the Board affirmed this finding,
12 dismissing the unfair labor practice complaint.

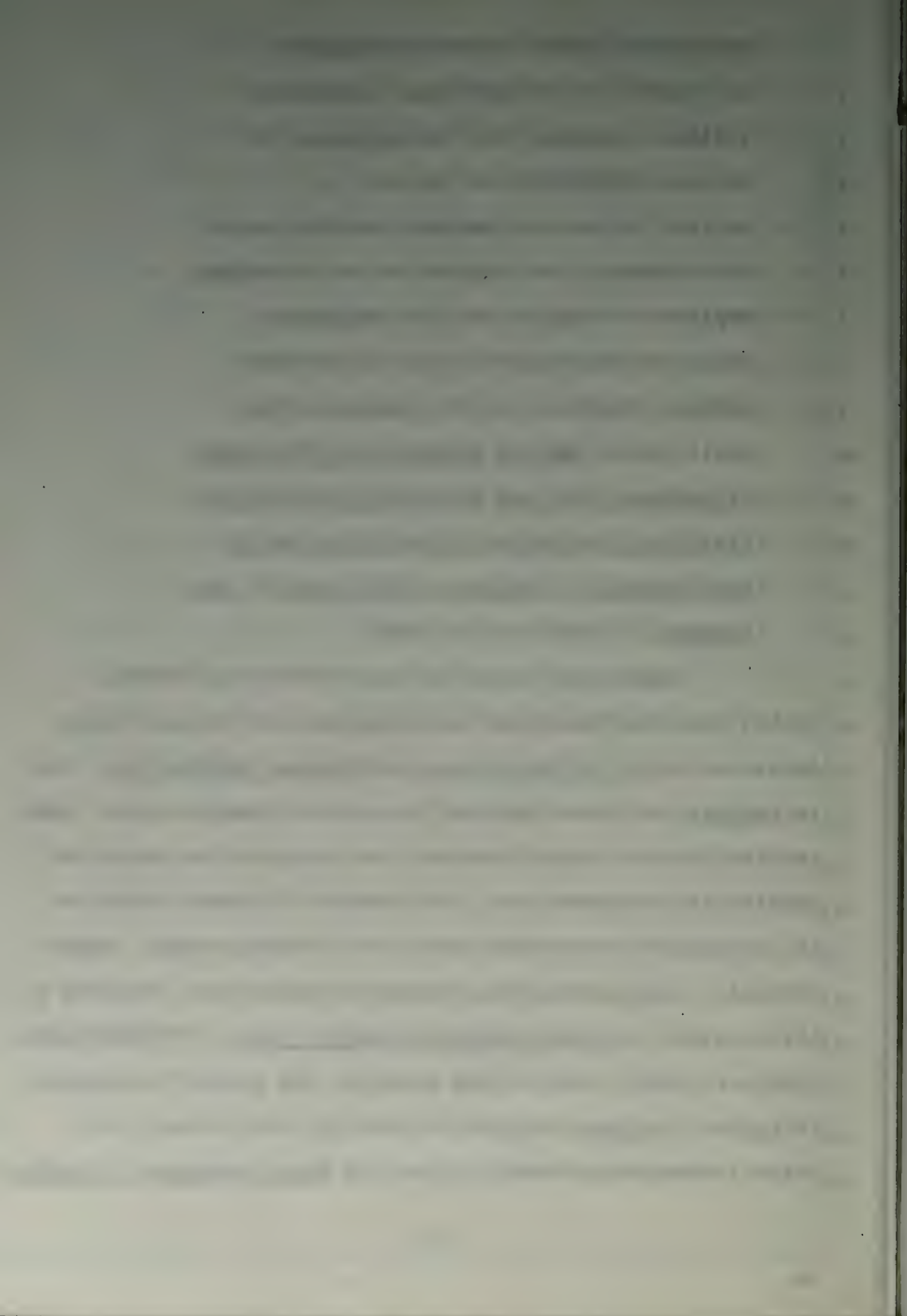
13 On a petition to review the Board's decision in
14 Bachman, the Court of Appeals for the Eighth Circuit set
15 aside the Board's decision. Bachman Machine Company v.
16 NLRB, 266 F.2d 599 (8th Cir. 1959). Since the Board had
17 applied the test of "common ownership and actual common
18 control", the sole question for review was whether there
19 was an adequate evidentiary basis for the Board's
20 determination that the two enterprises involved were in
21 fact commonly controlled. The court recognized that there
22 "was substantial evidence to support a finding that, during
23 the negotiations between Plastics and the union, Mr.
24 Bachman actively participated and made decisions." (266
25 F.2d at 602). But such evidence, in the court's view,
26 was insufficient as a matter of law to satisfy the require-
ment of actual common control:

" . . . [W]e think the evidence fell
short of establishing that both companies were



1 under such actual common management
2 or control as to make them allies and
3 a single employer for the purposes of
4 Section 8(b)(4)(A) of the Act. . . .
5 We fail to see why Bachman should, under
6 the evidence, be regarded as an offending
7 employer or why it and its employees
8 should be embroiled in the controversy
9 between Plastics and its employees and
10 their Union, merely because the President
11 of Bachman, who was also the President of
12 Plastics, controlled or participated in
13 the control of the labor relations of that
14 company." (266 F.2d at 605).

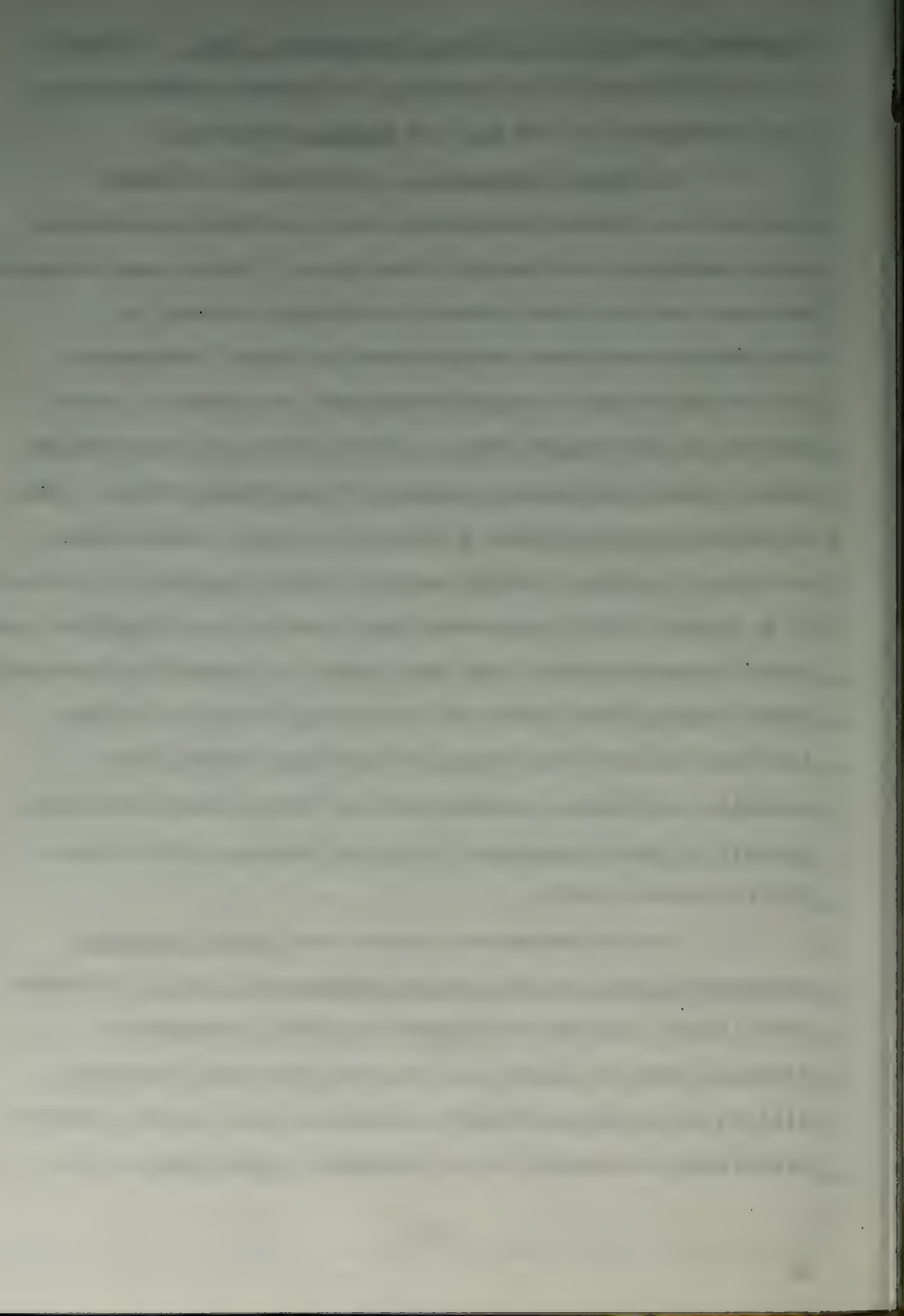
15 Appellants argue in their brief (pp. 28029,
16 39-40) that the Board has not accepted the Circuit Court
17 decisions in J. G. Roy & Sons and Bachman Machine Co. Yet
18 in Bachman the Board applied the actual-common-control test,
19 and the Circuit Court reversed, not because the Board had
20 applied an erroneous test, but because it found there was
21 an inadequate evidentiary basis for finding actual common
22 control. And although the Board did state in a footnote to
23 its decision in Acme Concrete & Supply Corp., 137 NLRB 1321,
24 1323 n.2 (1962) that it had accepted the Courts' decisions
25 in Roy and Bachman only as the law of those cases, the
26 Board subsequently made it clear in Miami Newspaper Printing



1 Pressmen Local No. 46 (Knight Newspapers, Inc.), 138 NLRB
2 1346 (1962) that it was adopting the actual-common-control
3 test formulated in the Roy and Bachman decisions.

4 In Knight Newspapers, the alleged secondary
5 employer was Knight Newspapers, Inc., an Ohio corporation,
6 which published the Detroit Free Press. The alleged primary
7 employer was the Miami Herald Publishing Company, a
8 corporation which was wholly owned by Knight Newspapers.
9 All of the stock of Knight Newspapers was owned by three
10 members of the Knight family, James, John and Clara Knight.
11 James Knight was general manager of the Miami Herald. John
12 Knight was president and a director of both corporations,
13 and Clara and James Knight served on both boards of directors.
14 In a Section 10(1) proceeding the district court applied the
15 actual-common-control test and issued an injunction premised
16 on the finding that there was reasonable cause to believe
17 that the Detroit Free Press and the Miami Herald were
18 separate employers, notwithstanding their common ownership.
19 Roumell v. Miami Newspaper Printing Pressmen, 198 F.Supp.
20 851 (E.D.Mich. 1961).

21 In the subsequent Board case, Miami Printing
22 Pressmen's Local No. 46 (Knight Newspapers, Inc.), 138 NLRB
23 1346 (1962), the Board affirmed the Trial Examiner's
24 findings that the union had violated Sections 8(b)(4)(1)
25 (11)(B) by picketing Knight Newspapers, Inc. at the Detroit
26 Free Press in support of its economic strike against the



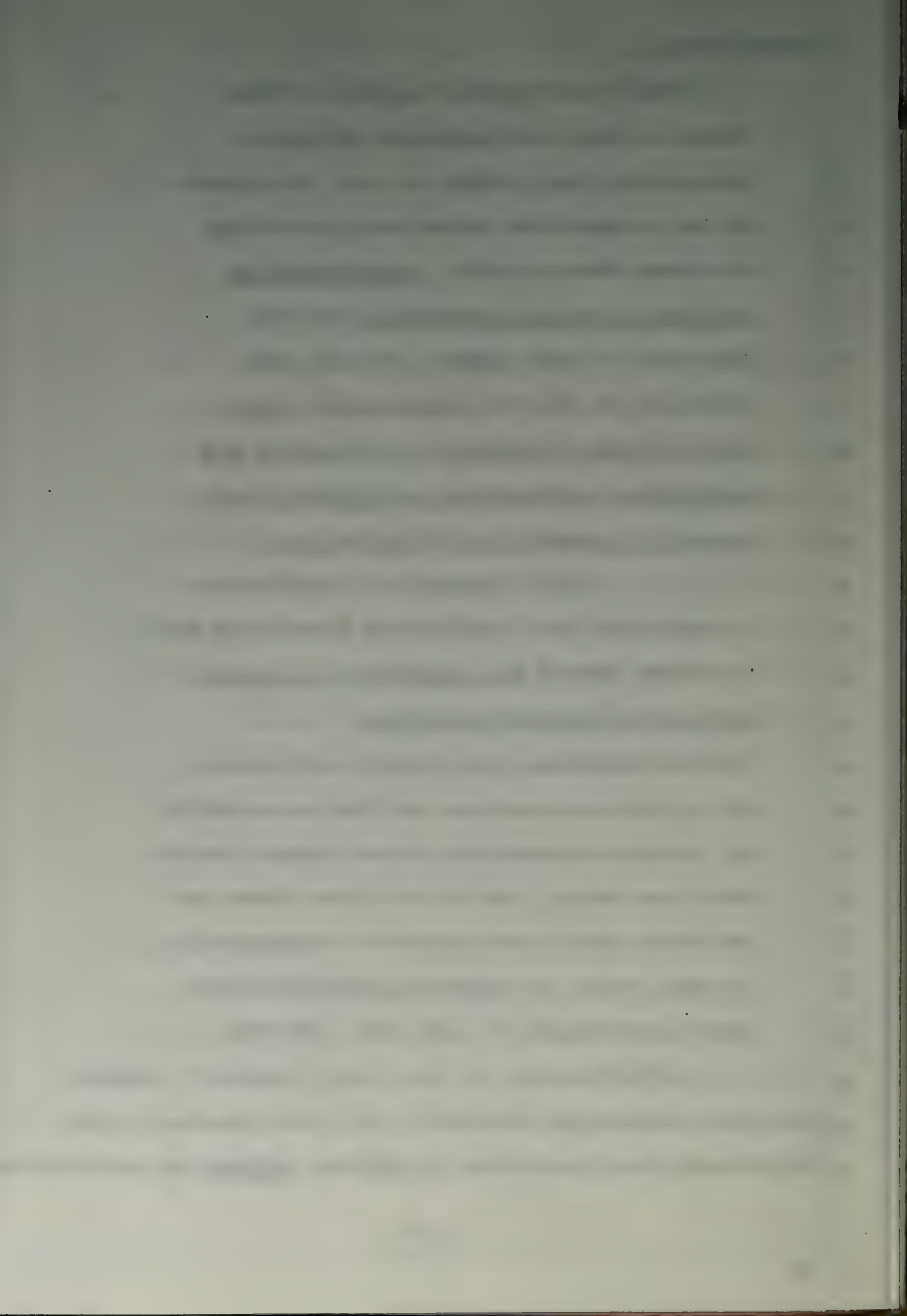
1 Miami Herald:

2 "The record shows the Detroit Free
3 Press is owned and published by Knight
4 Newspapers, Inc., which is also the parent
5 of the corporation owning and publishing
6 the Miami Herald; that, notwithstanding
7 the fact of single ownership, and the
8 existence of some common officers and
9 directors of the two corporations, they
10 are operated in substance as separate and
11 autonomous corporations, publishing news-
12 papers in communities 800 miles apart. . . .

13 ". . . [The evidence is] insufficient
14 to establish that the Detroit Free Press and
15 the Miami Herald are operated as a single
16 integrated business operation. . . .

17 [N]otwithstanding the closely held nature
18 of the two corporations and the potentiality
19 of integrated operations under common control
20 that does exist, the Detroit Free Press and
21 the Miami Herald are operated independently
22 of each other, as separate autonomous news-
23 paper enterprises." (138 NLRB 1347-48).

24 Sifnificantly, in the Trial Examiner's report
25 which was adopted by the Board, the Trial Examiner cited
26 the Circuit Court decisions in Roy and Bachman as establishing

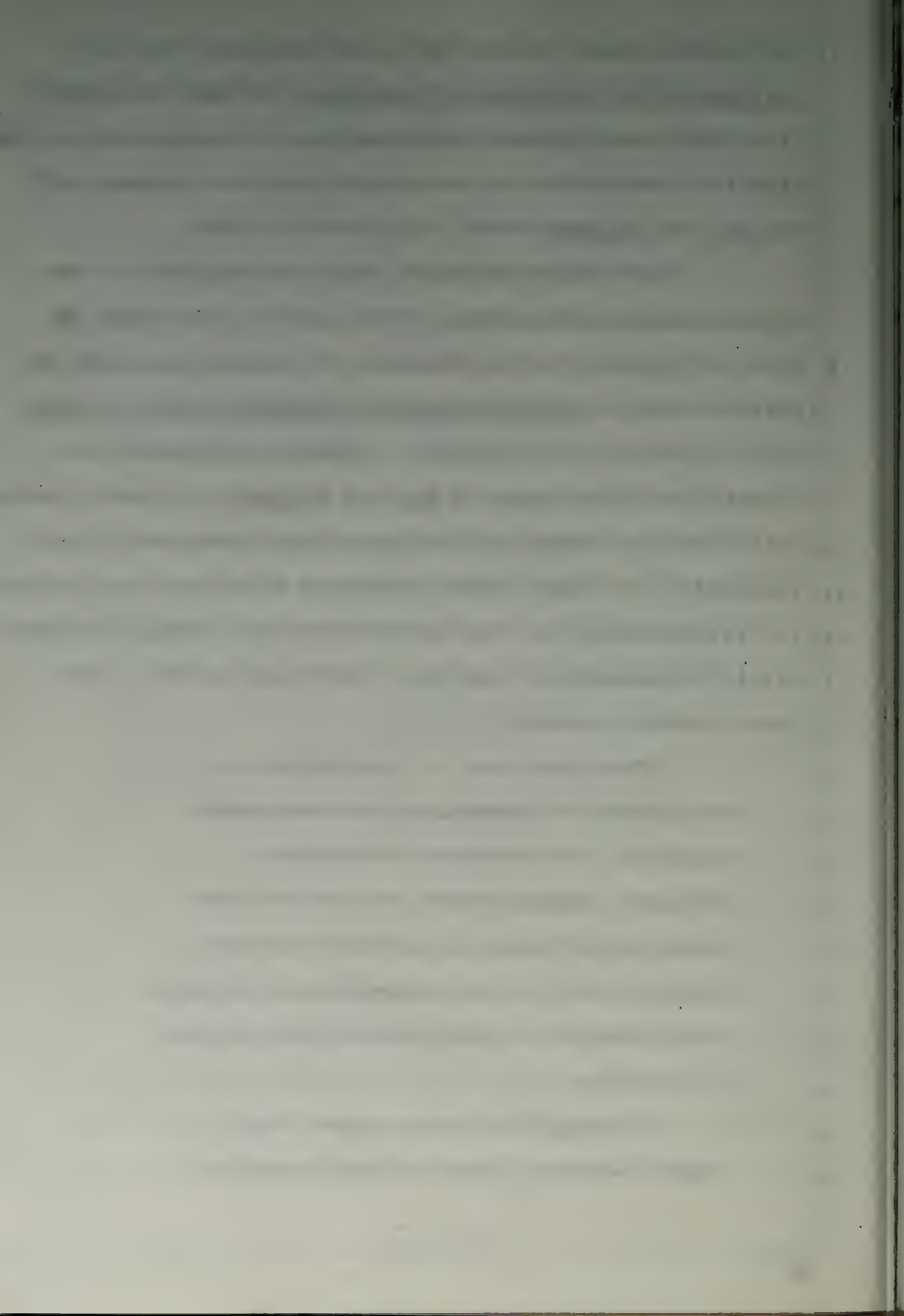


1 the actual-common-control test, and commented that in
2 Amalgamated Lithographers of America, 130 NLRB 985 (1961)
3 "the Board unambiguously indicated that it acquiesced in the
4 principal enunciated by the circuit courts of appeals in"
5 the Roy and Bachman cases. (138 NLRB at 1352).

6 Were there any doubt about the validity of the
7 actual-common-control test, it was laid to rest when the
8 Court of Appelas for the District of Columbia enforced the
9 Board's order in Miami Newspaper Pressmen's Local v. NLRB,
10 322 F.2d 405 (D.C.Cir. 1963). Citing with approval the
11 Circuit Court decisions in Roy and Bachman, the court stated
12 that "both the Board and the courts have consistently and
13 repeatedly held that common ownership alone does not suffice"
14 for establishing that two enterprises are a single employer
15 within the meaning of the Act. (322 F.2d at 408). The
16 court further stated:

17 "There must be . . . an actual . . .
18 integration of operations and management
19 policies. Two business enterprises,
20 although commonly owned, do not for that
21 reason alone become so allied with each
22 other as to lift the congressional ban upon
23 the extension of labor strife from the one
24 to the other.

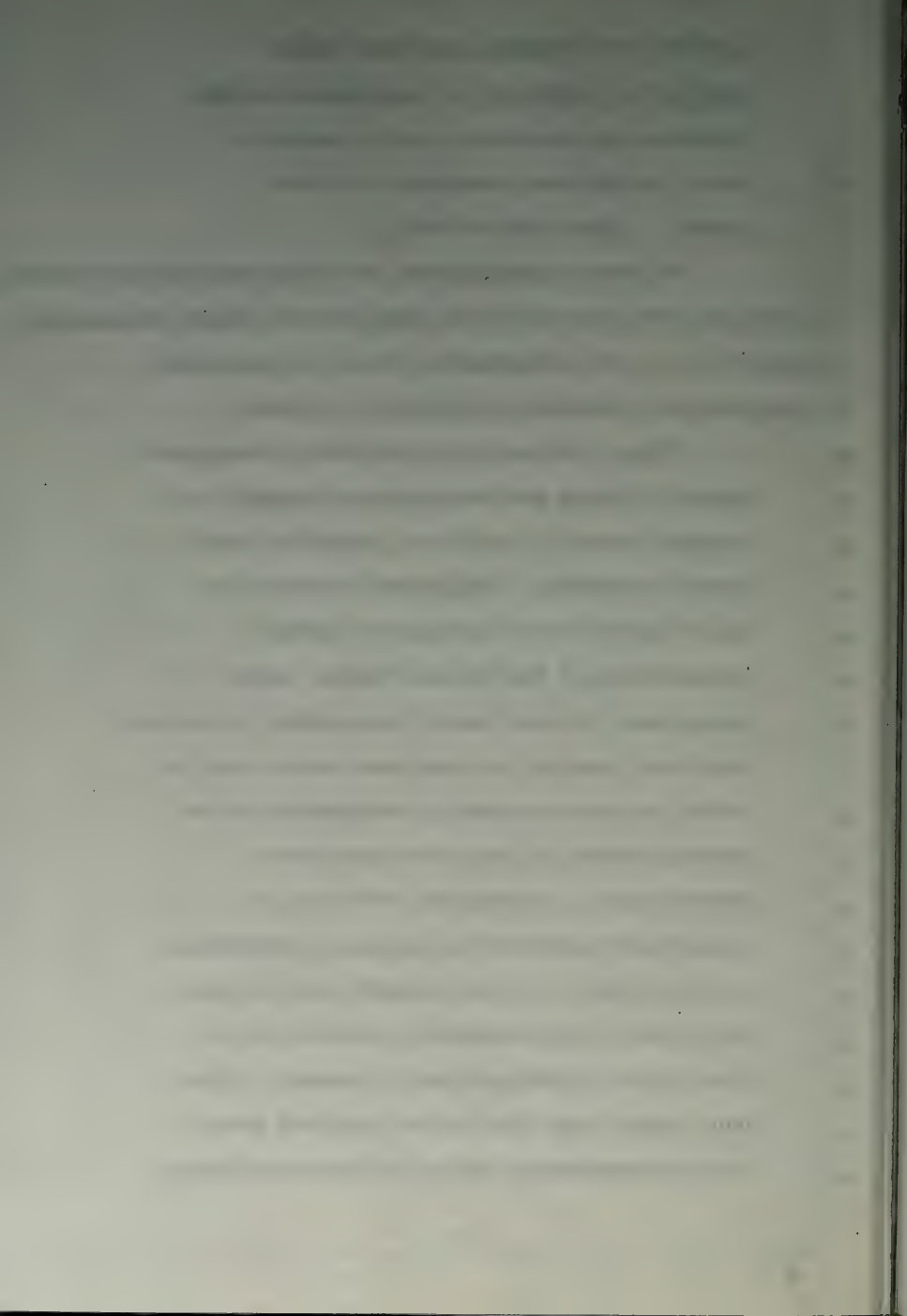
25 "Although the Union argues that
26 common ownership alone is sufficient to



1. justify its bringing the Free Press
2. within the orbit of its legitimate strike
3. pressure, it does not - as it cannot -
4. rest, in the last analysis, on this
5. claim." (322 F.2d at 409).

6. Of equal significance for this case was the stress
7. placed by the court upon the many factors which necessarily
8. contribute to the independent nature of newspaper
9. organizations operated in different cities:

10. "These two metropolitan daily newspapers
11. appear to have had separate and largely un-
12. related lives of their own, despite their
13. common ownership. Published hundreds of
14. miles apart in two distinctive urban
15. communities of the United States, each
16. paper went its way under independent direction
17. supplied locally, as they must have done in
18. order to be successfully responsive to the
19. varying needs of their two unrelated
20. readerships. A newspaper reflects in
21. significant measure the peculiar personality
22. of its locale. To the extent that it does
23. so in fact, its commercial success is to
24. that degree correspondingly assured. Wise
25. publishers know this to be true and shape
26. their arrangements and policies accordingly.

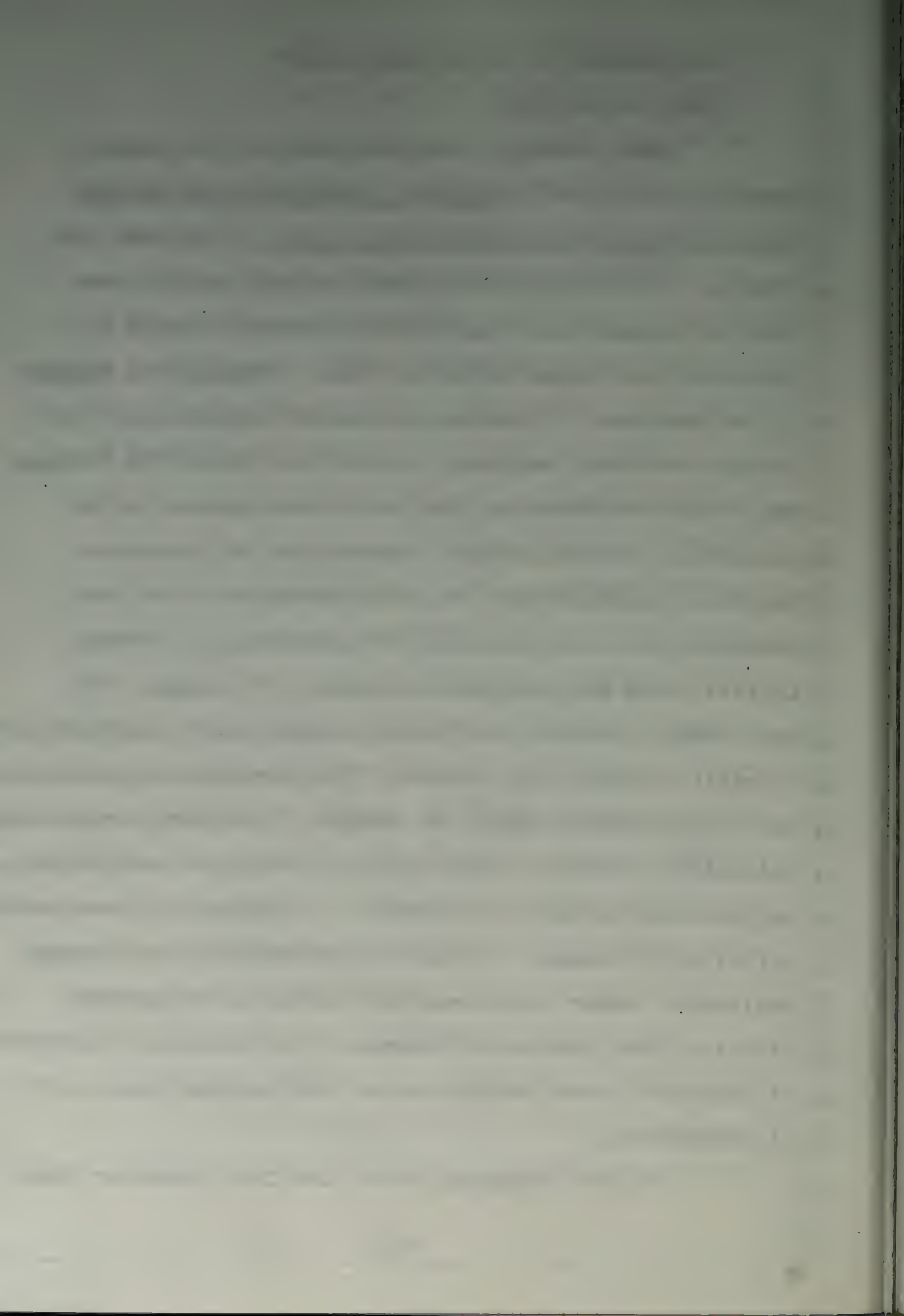


1 This appears to be the case here."

2 (322 F.2d at 409).

3 More recently, the Board applied the actual-
4 common-control test in Drivers, Chauffeurs and Helpers
5 Local No. 639 (Poole's Warehousing, Inc.), 158 NLRB 1281
6 (1966). In this case the alleged primary employer was
7 Poole's Drayage Co., a partnership between Charles W.
8 Poole and his brother Brereton Poole. Drayage was engaged
9 in the business of trucking perishable commodities. The
10 alleged secondary employer, located two miles from Drayage,
11 was Poole's Warehousing, Inc., which was engaged in the
12 business of storing grocery commodities for producers.
13 The Poole brothers were the sole shareholders and were
14 president and vice president of Warehousing. Although
15 Charles Poole was the general manager of Drayage, its
16 day-to-day operations and labor problems were supervised by
17 a traffic manager, Mr. Stevens. The warehousing operations
18 were run by Edward Hampl, as manager. Although Warehousing
19 maintained separate account books, a separate bank account,
20 and separate accounts receivable, it shared the same general
21 office with Drayage. In addition Warehousing and Drayage
22 employed a common bookkeeper who worked in the general
23 office on the premises of Drayage. Approximately 7 percent
24 of Drayage's gross receipts were from hauling items stored
25 at Warehousing.

26 On the foregoing facts, the Trial Examiner found

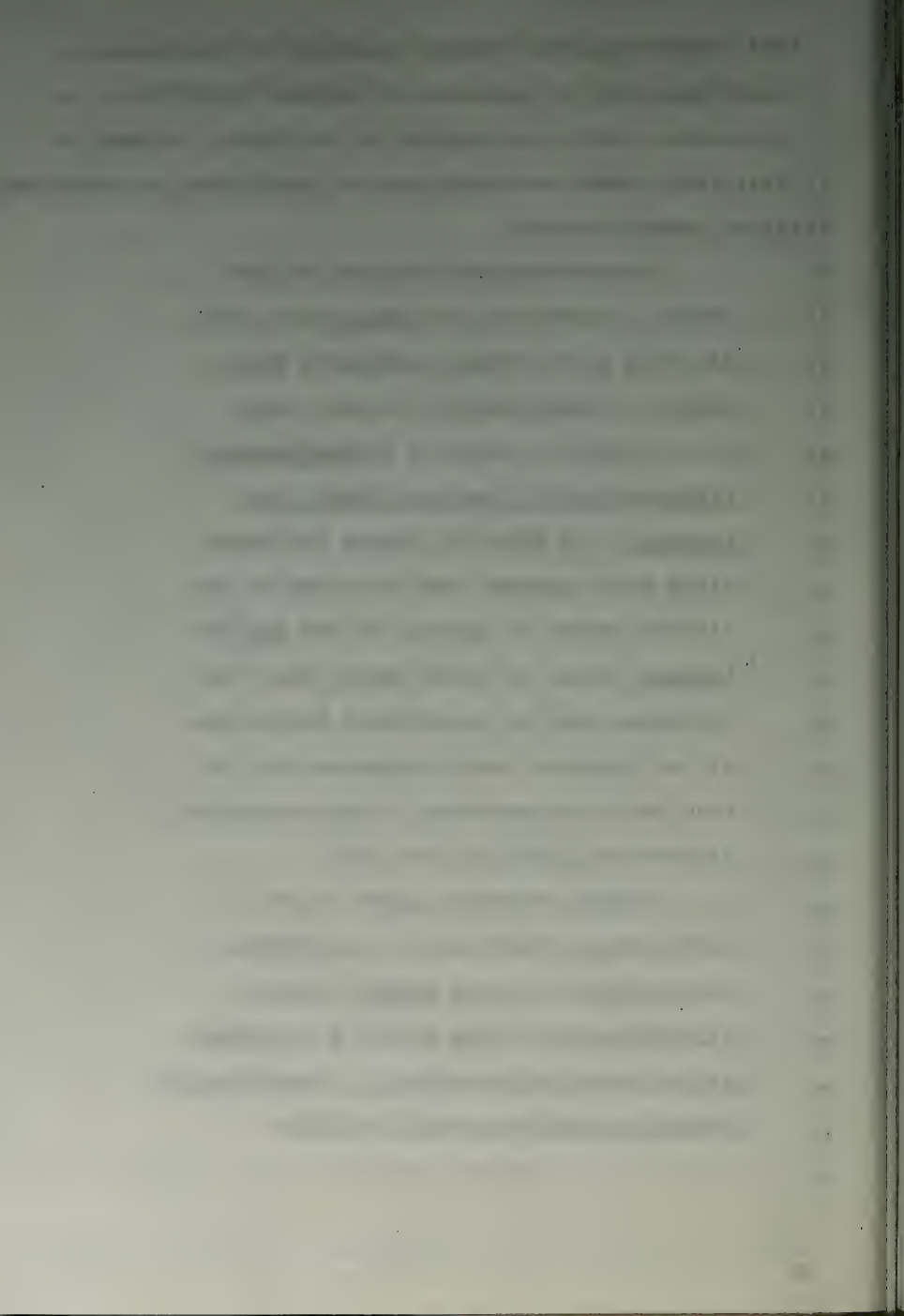


1 that Warehousing and Drayage could not be considered a
2 single employer for purposes of Section 8(b)(4)(B). In
3 his opinion, which was adopted by the Board, he made it
4 clear that common ownership was not sufficient to establish
5 active common control:

6 "Considering the decision of the
7 court of appeals in the Miami case, the
8 decision in the Trial Examiner's Report
9 which the Board adopted in that case,
10 and the Board's decision in Amalgamated
11 Lithographers of America (Miami Post
12 Company), 130 NLRB 968, where the Board
13 cited with approval the decisions of the
14 circuit courts of appeals in the Roy and
15 Bachman cases, it would appear that the
16 following must be established before one
17 of two commonly owned companies will be
18 held not to be entitled to the protection
19 of Section 8(b)(4) of the Act:

20 "Common ownership alone is not
21 sufficient. There must be in addition
22 such actual or active common control,
23 as distinguished from merely a potential,
24 as to denote an appreciable integration of
25 operations and management policies.

26 * * * *



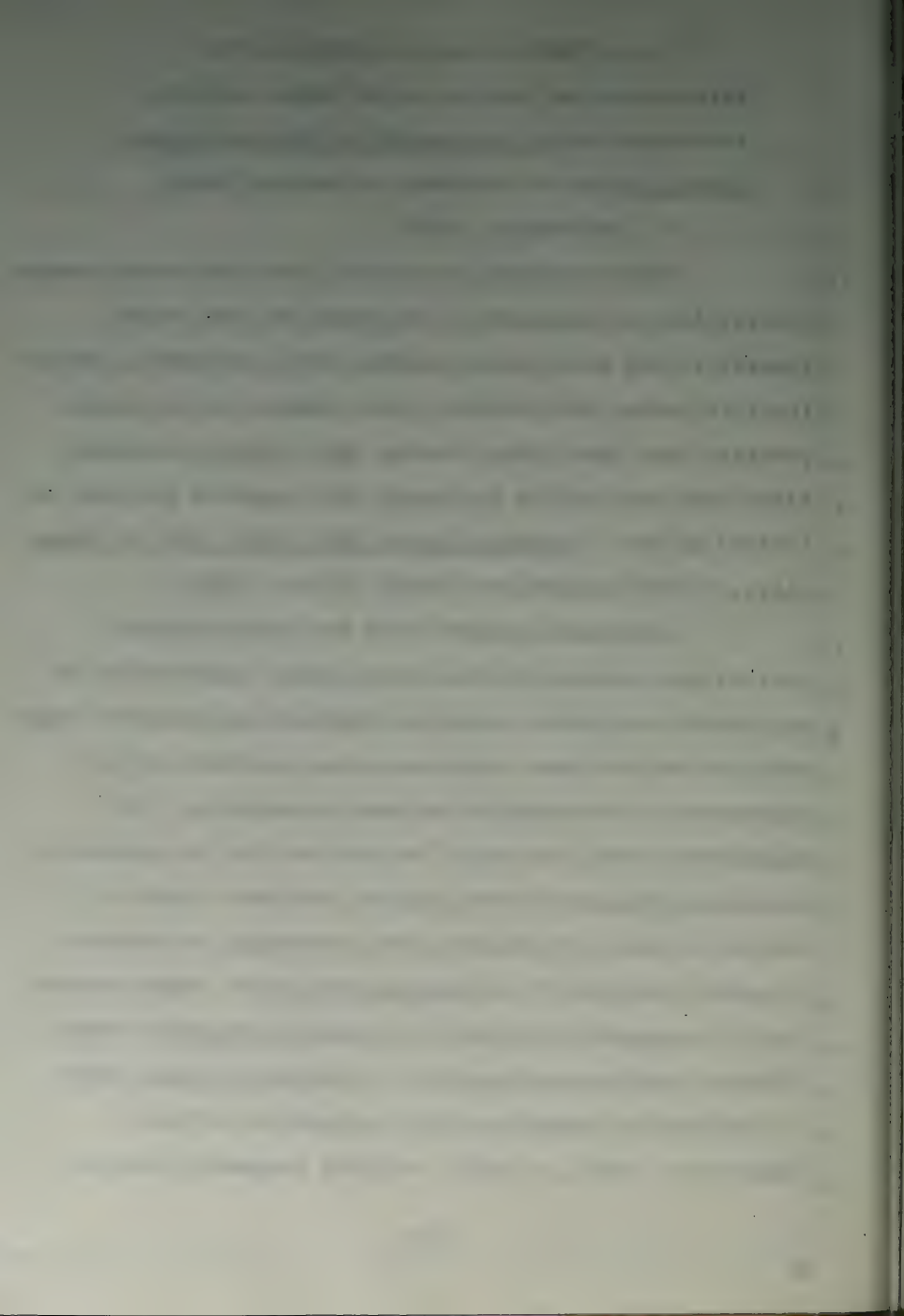
1 ". . . While potential control over
2 Warehousing may reside in the Poole brothers,
3 the actual or active control of the day-to-day
4 operations is in the hands of Manager Hampl.

5 . . ." (158 NLRB at 1286).

6 There can thus be no doubt that the actual-common-
7 control test is accepted by the Board and the courts.

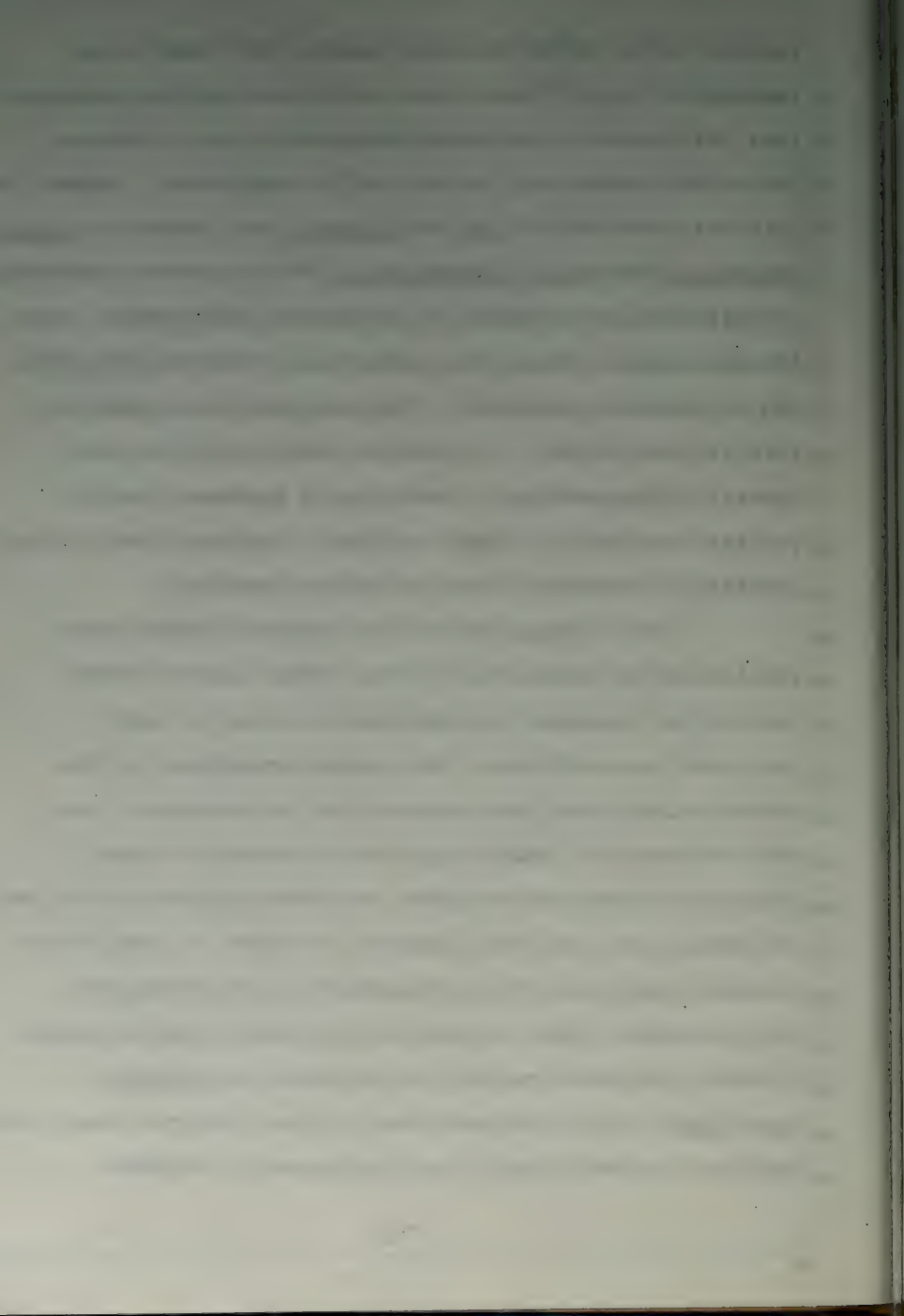
8 Indeed, in the most recent Section 10(1) proceeding involv-
9 ing this issue, the district court granted an injunction
10 premised upon that rule, stating that "common ownership
11 alone does not suffice to demand that separate entities be
12 treated as one." Hoban v. Local 559, Int'l. Bhd. of Team-
13 sters, 55 CCH Lab.Cas.Par. 12007 (D.Conn. 1967).

14 Appellants contend that the actual-common-
15 control test adopted by the above line of authorities is
16 applicable only where there are distinct and separate legal
17 entities and not when the enterprises involved are un-
18 incorporated divisions of the same corporation. In
19 Appellants' view, the rule "was adopted for the purpose of
20 preventing employers from limiting the basic right of
21 unions to picket by adopting the subterfuge of separate
22 corporate entities," and application of the common control
23 test to separate divisions of a single corporation would
24 "distort and reverse that rule to achieve a result which
25 is the precise opposite of its purpose and effect."
26 (Appellants' Brief, p. 24). But this argument finds no



1 support in the above discussed cases. For there is no
2 language in any of those cases which even remotely suggests
3 that the courts or the Board conceived of the rule as a
4 device for preventing "subterfuge" by employers. Indeed, the
5 rule was conceived in Roy and Bachman, and invoked in Knight
6 Newspapers and Poole's Warehousing, not to prevent subterfuge
7 by employers but to extend to independent enterprises, even
8 though commonly owned, the protection of Section 8(b)(4)'s
9 ban on secondary boycotts. The principle underlying the
10 rule is even-handed. It protects enterprises that are
11 operated independently of the primary business; and it
12 protects the union's right to picket a business which is not
13 genuinely independent from the primary employer.

14 Not a single one of the above-discussed cases
15 predicates the application of the actual-common-control
16 rule on the presence or significance of one or more
17 corporate personalities. The common denominator of the
18 cases is that they look through form to substance. And,
19 this rationale is equally applicable whether a labor
20 dispute involves one fictional corporate personality or two.
21 In either case, the rule commands the court to look to the
22 economic realities of intercorporate or intracorporate
23 relationships. This is manifestly evident from the manner
24 in which the Board reached its decision in Alexander
25 Warehouse. For as we have seen, in that case the Board did
26 not rest its decision on the touchstone of corporate



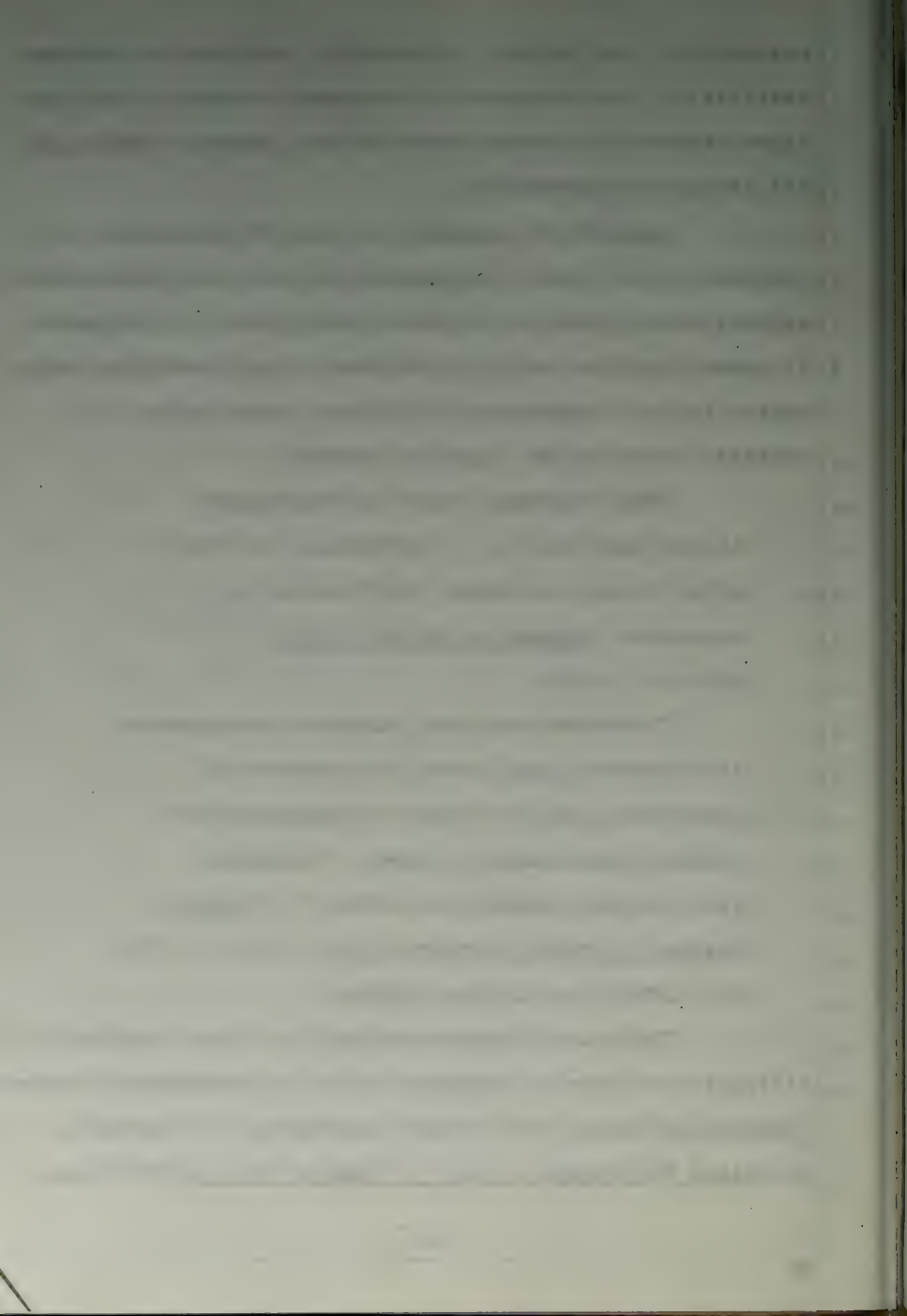
1 personality, but rather, it carefully analyzed the economic
2 realities of the situation to determine whether or not the
3 three separate warehouses were in fact commonly controlled
4 and integrated operations.

5 Appellants' argument is thus an incantation to
6 the sanctity of form. It ignores the fact that businessmen
7 arrange enterprises in different legal modes for purposes
8 of commercial law, wholly unrelated to considerations which
9 obtain in the formulation of national labor policy. As
10 recently stated by Mr. Justice Stewart:

11 "The [Supreme] Court has emphasized
12 in the past that . . . differences in form
13 often do not represent 'differences in
14 substance' Simpson v. Union Oil Co.,
15 377 U.S. 13, 22.

16 "Draftsmen may cast business arrangements
17 in different legal modes for purposes of
18 commercial law, but these arrangements may
19 operate identically in terms of economic
20 function and competitive effect." (United
21 States v. Arnold, Schwinn & Co., 388 U.S. 365,
22 393 (1967) (concurring opinion).

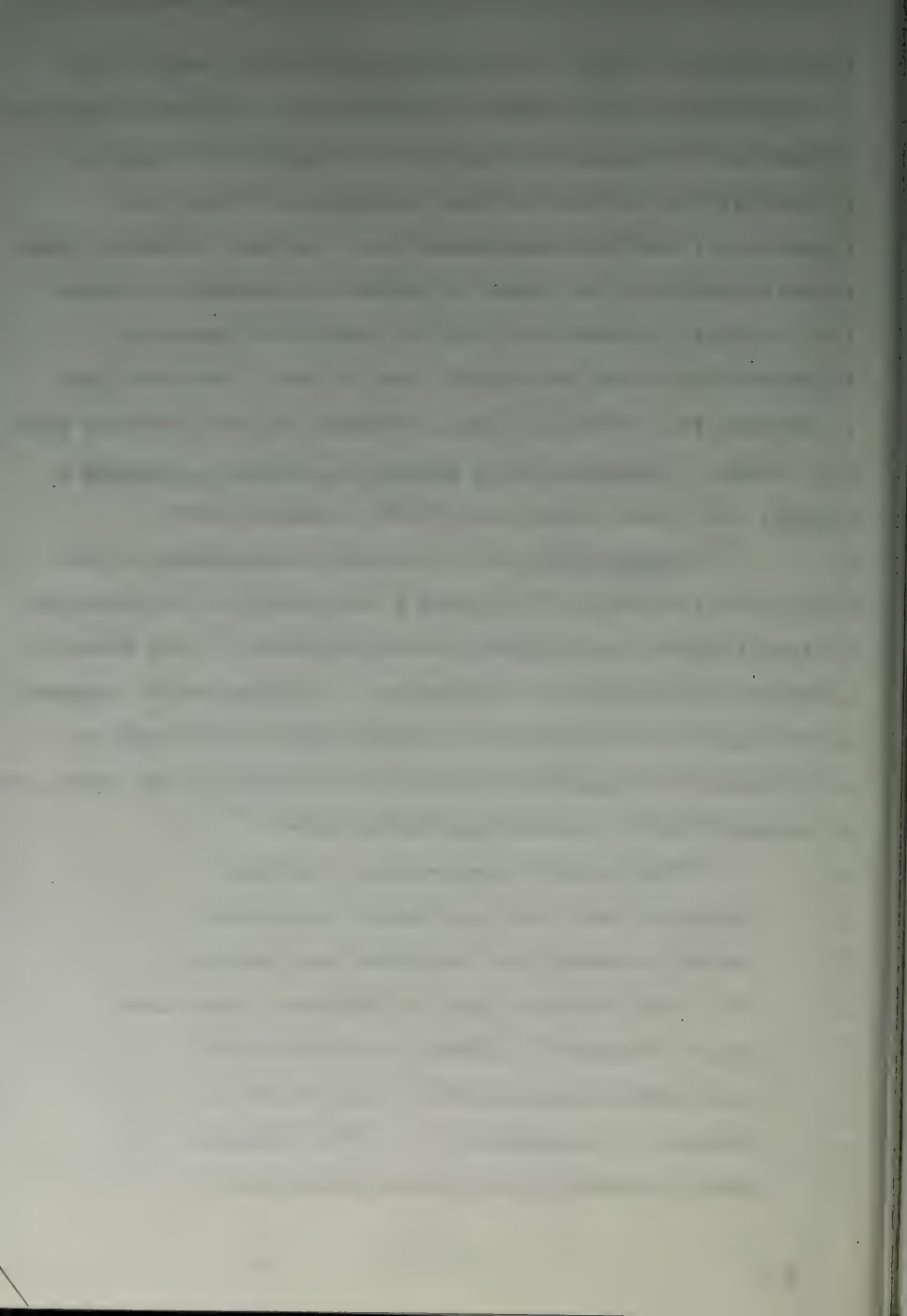
23 The courts have accordingly not been reluctant to
24 disregard the form of corporate unity in determining whether
25 separate divisions are in fact autonomous. For example,
26 in Reines Distributors, Inc. v. Admiral Corp., 256 F.Supp.



1 581 (S.D.N.Y. 1966), the court stated that it would "look
2 to substance rather than form" in order to determine whether
3 seemingly autonomous division of a corporation could be
4 considered a customer of that corporation within the
5 meaning of the Robinson-Patman Act. And more recently, when
6 confronted with the issue of whether autonomous divisions
7 of a single corporation could be considered separate
8 persons under the anti-trust laws, a court concluded that
9 the mere fact of single legal identity did not preclude such
10 a finding. Hawaiian Oke & Liquors v. Joseph E. Seagram &
11 Sons, 1967 Trade Cases Par. 72186 (D.Hawaii 1967).

12 Hawaiian Oke was a private treble-damage action
13 in which the plaintiff alleged a conspiracy in restraint of
14 trade between four unincorporated divisions of the House of
15 Seagram and three other companies. The defendants' argument
16 that separate divisions of a single corporation could not
17 be considered separate entities was rejected by the court, in
18 language that is equally applicable here:

19 "But are all corporations, in fact,
20 'persons' each with one brain, one nerve
21 center, at which all decisions are reached?
22 It is well settled that in corporate structures
23 which consist of a parent corporation and
24 incorporated subsidiaries, each entity is
25 capable of conspiring. . . . The question,
26 then, is what, if any, magic occurs when



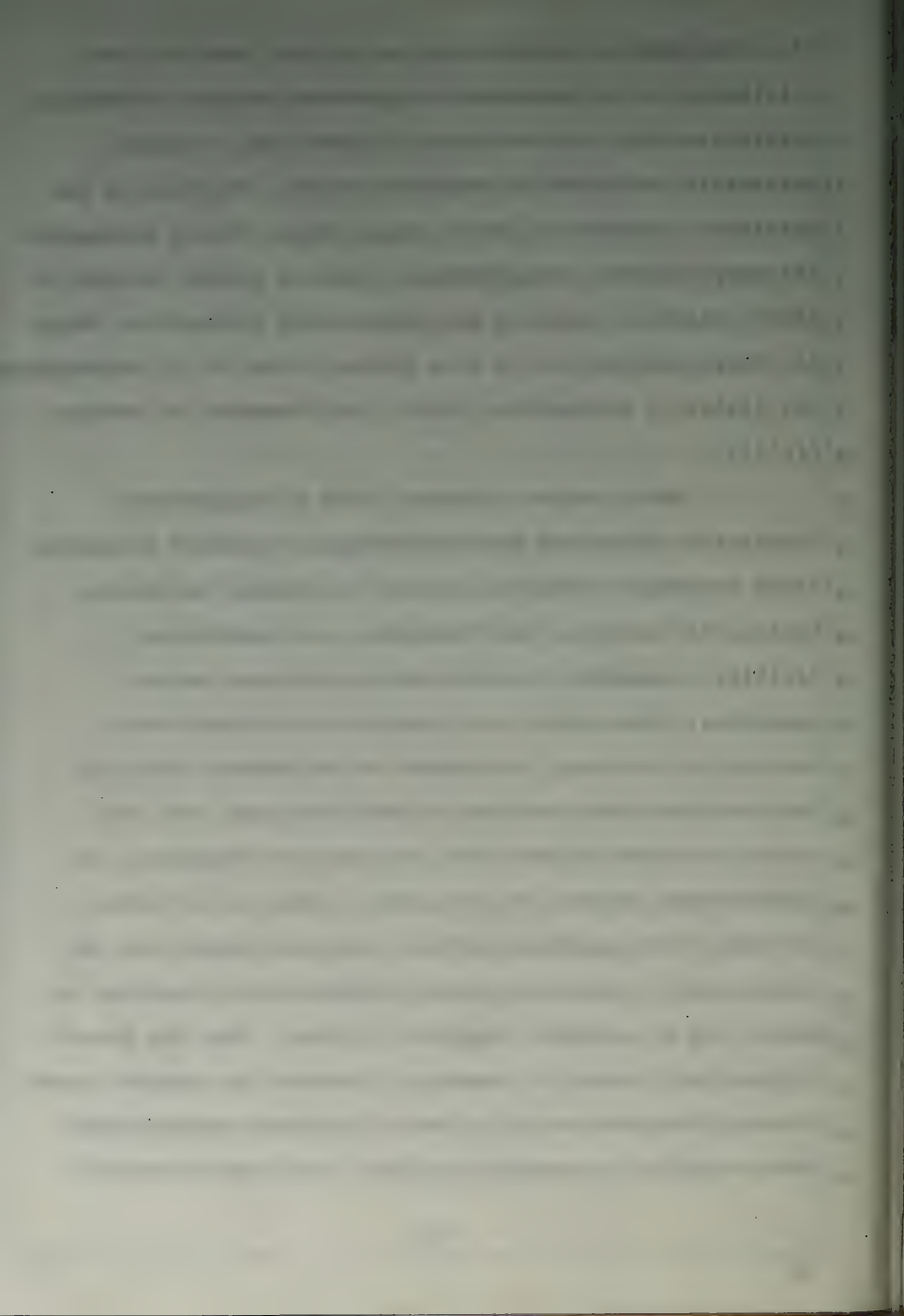
1 the paper partition is removed. Is a
2 business group which chooses to organize
3 as a single corporation with unincorporated
4 divisions automatically cast in the form
5 of a normal person? Or may we have a
6 corporate 'person' in the form of a multi-
7 headed Siva, or as portrayed by Dali or
8 Artzybasheff?

9 "Thus, whether a division is capable
10 of conspiring depends on the particular
11 facts demonstrated. Is each facet of the
12 unincorporated division's operation in fact,
13 for all purposes, controlled and directed
14 from above, or is it endowed with separable,
15 self-generated and moving power to act in
16 the pertinent area of economic activity?
17 This is the key question. If the division
18 operates independently in directing the
19 relevant business activity, then it is a
20 separate business entity under the anti-
21 trust laws. There is nothing sacrosanct
22 about the 'unincorporated' aspect of corporate
23 divisions." (pp. 84261-62).

24 Likewise in the field of labor relations, there is
25 no reason to elevate the concept of corporate personality
26 to the status of sacred dogma. An autonomous division of

1 of a conglomerate corporation may in fact have all the
2 attributes of an independently operated business enterprise
3 notwithstanding the fact that it lacks the fictional
4 personality accorded by corporate birth. To focus on the
5 question of whether it has a legal psyche wholly disregards
6 the many relevant considerations such as common control of
7 labor relations policies and operational integration which
8 the Board and the courts have always looked to in determining
9 the status of enterprises within the framework of Section
10 8(b)(4).

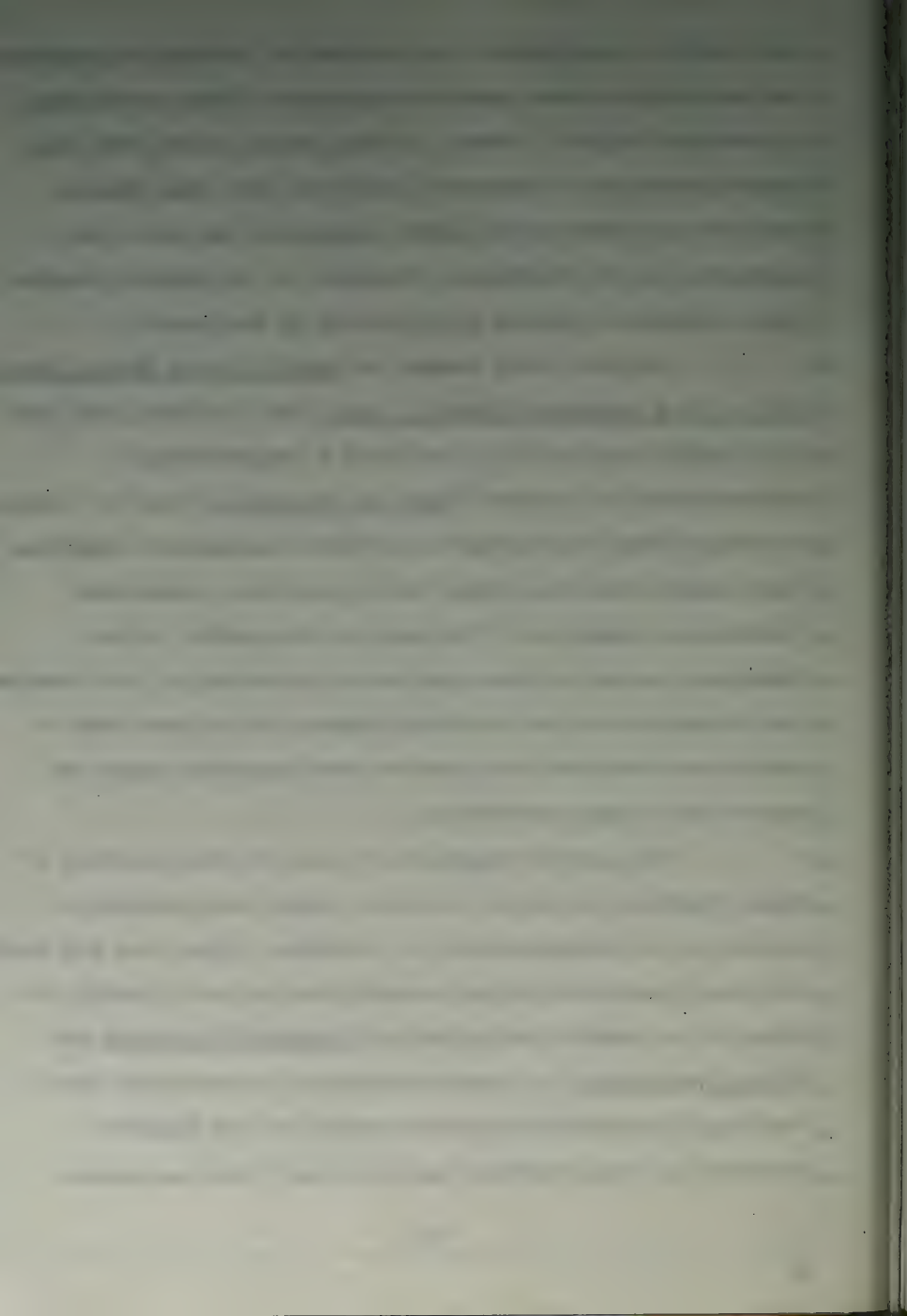
11 Here, we are concerned with a conglomerate
12 corporation which has many autonomously operated divisions:
13 seven newspaper divisions located in Albany, Baltimore,
14 Boston, San Antonio, San Francisco, Los Angeles and
15 Seattle; a magazine division which publishes twelve
16 magazines; three radio and television divisions which
17 operate in Pittsburg, Baltimore and Milwaukee; the King
18 Features Syndicate division in New York City; two real
19 estate divisions in New York City and San Francisco; an
20 International Studio Art Division; a land and livestock
21 division which operates western ranch and properties and
22 timberlands; a specialty paper division which operates in
23 Maine; and a newspaper supplies division. Had The Hearst
24 Corporation chosen for commercial reasons to organize these
25 diverse divisions as wholly owned corporate subsidiaries,
26 there would be no question but that the "common control"



1 test would be applicable for purposes of determining whether
2 the enterprises were separate employers within the meaning
3 of Section 8(b)(4). "What, if any, magic occurs when the
4 paper partition is removed?" Does the fact that Hearst
5 has a single personality under commercial law give the
6 employees in its Studio Art Division or its western ranches
7 carte blanche to picket in Pittsburg or Baltimore?

8 As this court stated in Retail Clerks Union, Local
9 137 v. Food Employers Council, Inc., 351 F.2d 525, 531 (9th
10 Cir. 1965), Section 10(1) reflects a Congressional
11 determination to prevent "harm to the public" that is likely
12 to result from the disruption of labor-management relations
13 that occurs when the unfair labor practices enumerated
14 therein are committed. The harm to the public in San
15 Francisco caused by the Appellants' picketing of the Examiner,
16 the Chronicle and the Printing Company is no less than it
17 would have been had the Examiner been operated under the
18 mantle of a legal personality.

19 So much for Appellants' plea for the sanctity of
20 form. Suffice it to say that the legal issue herein in-
21 volved is not insubstantial or frivolous. That was all that
22 the Court below was called upon to decide, and clearly, in
23 view of the Board's decisions in Alexander Warehouse and
24 Knight Newspapers, it cannot seriously be contended that
25 the legal proposition advanced herein by the Regional
26 Director is wholly without basis in law. The respondents



1 in Knight Newspapers also challenged the common-control
2 rule as being wholly without merit in the context of
3 commonly owned newspapers, but the district court rejected
4 their argument in language that is particularly applicable
5 here:

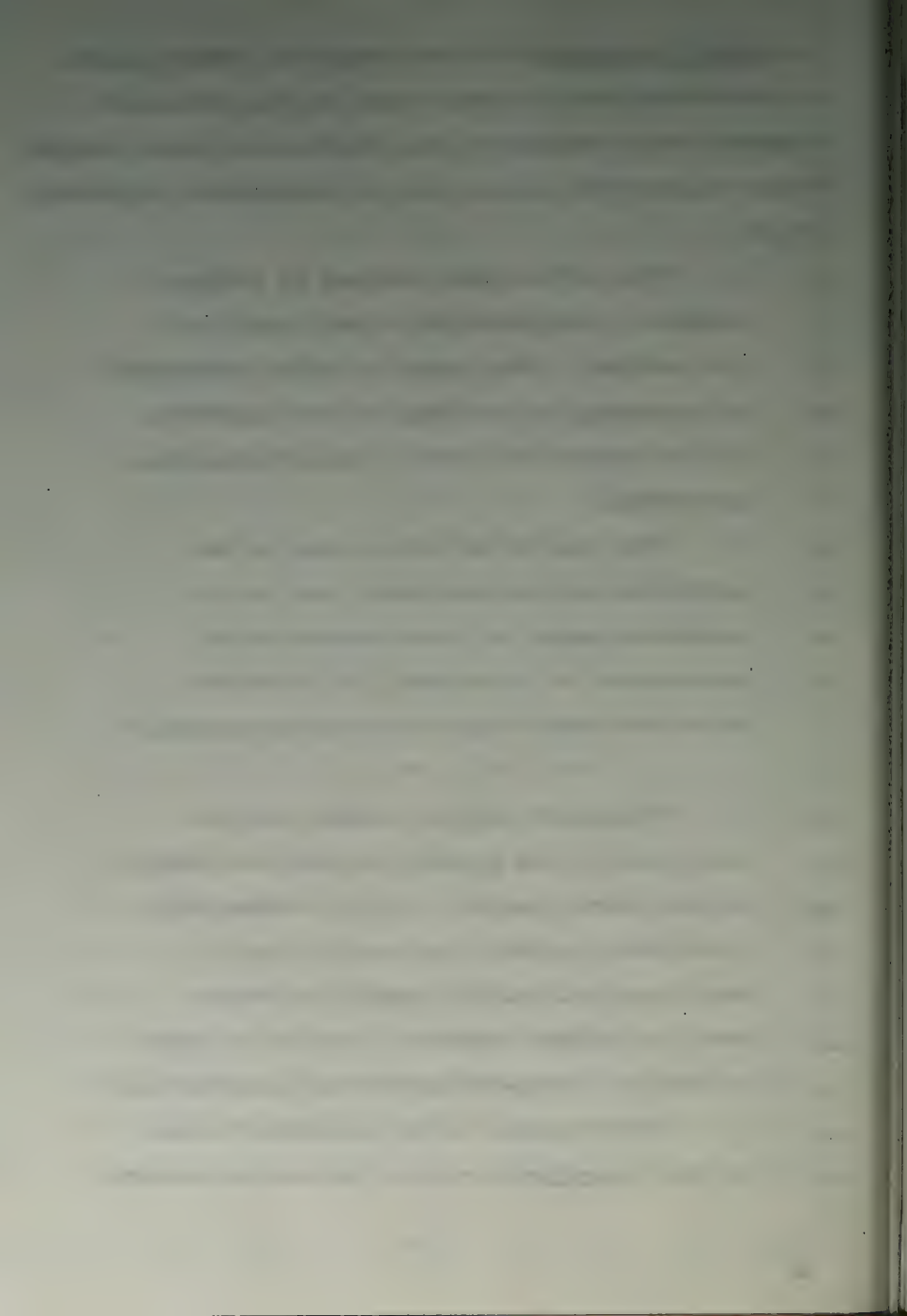
6 "The difficulties involved in reading
7 coherent interpretations of our labor law
8 are manifest. They ought not to be compounded
9 by requiring the settling of these questions
10 in the context of a hastily called injunction
11 proceeding.

12 "The rule of law relied upon by the
13 petitioner may be questioned, but, as it
14 certainly cannot be characterized as un-
15 substantial or 'frivolous', it is not for
16 me at this time to pass upon its correctness."

17 * * *

18 "Respondent cogently argues that the
19 sole owner of the primary employer can hardly
20 be considered 'neutral'. This is especially
21 true where, as here, the owner is not a
22 mere financial holding company but rather
23 owns the primary employer as part of a chain
24 of similar (newspaper publishing) corporations.

25 "Nevertheless, as the petitioner's view
26 of this unsettled corner of the law is certainly

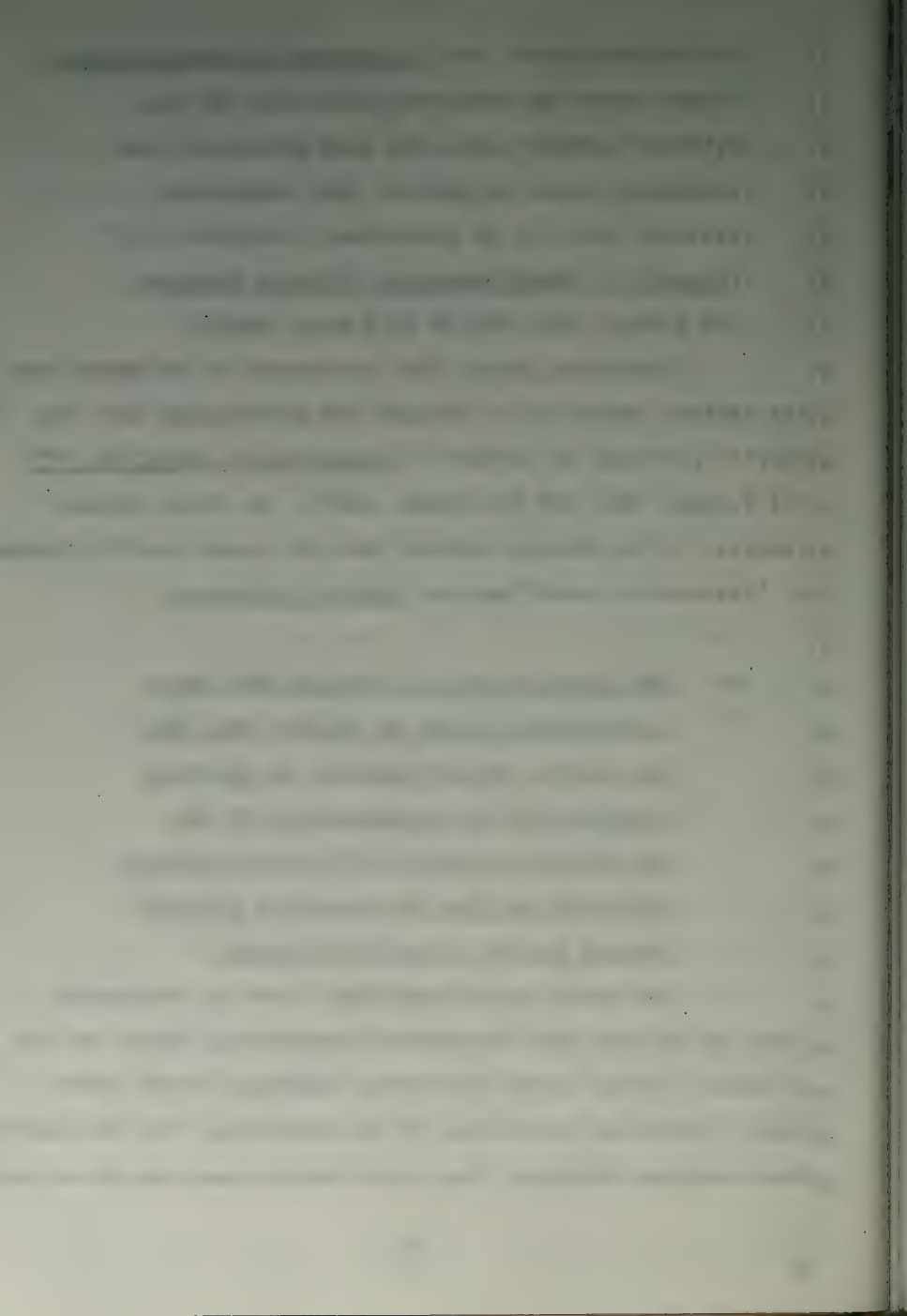


1 not without merit, nor 'frivolous' or unsubstantial,
2 I must grant the temporary injunction if the
3 evidence adduced indicates that petitioner has
4 reasonable cause to believe that respondent
5 violated the Act, as petitioner interprets it."
6 (Roumell v. Miami Newspaper Printing Pressmen,
7 198 F.Supp. 851, 853-54 (E.D.Mich. 1961).

8 Similarly, here, "the inferences to be drawn from
9 the decided cases do not exclude the possibility that the
10 Board's position is correct." Schauffler v. Local No. 677
11 201 F.Supp. 637, 638 (E.D.Penn. 1961). In these circum-
12 stances, it is plainly evident that the lower court's finding
13 of "reasonable cause" was not clearly erroneous.

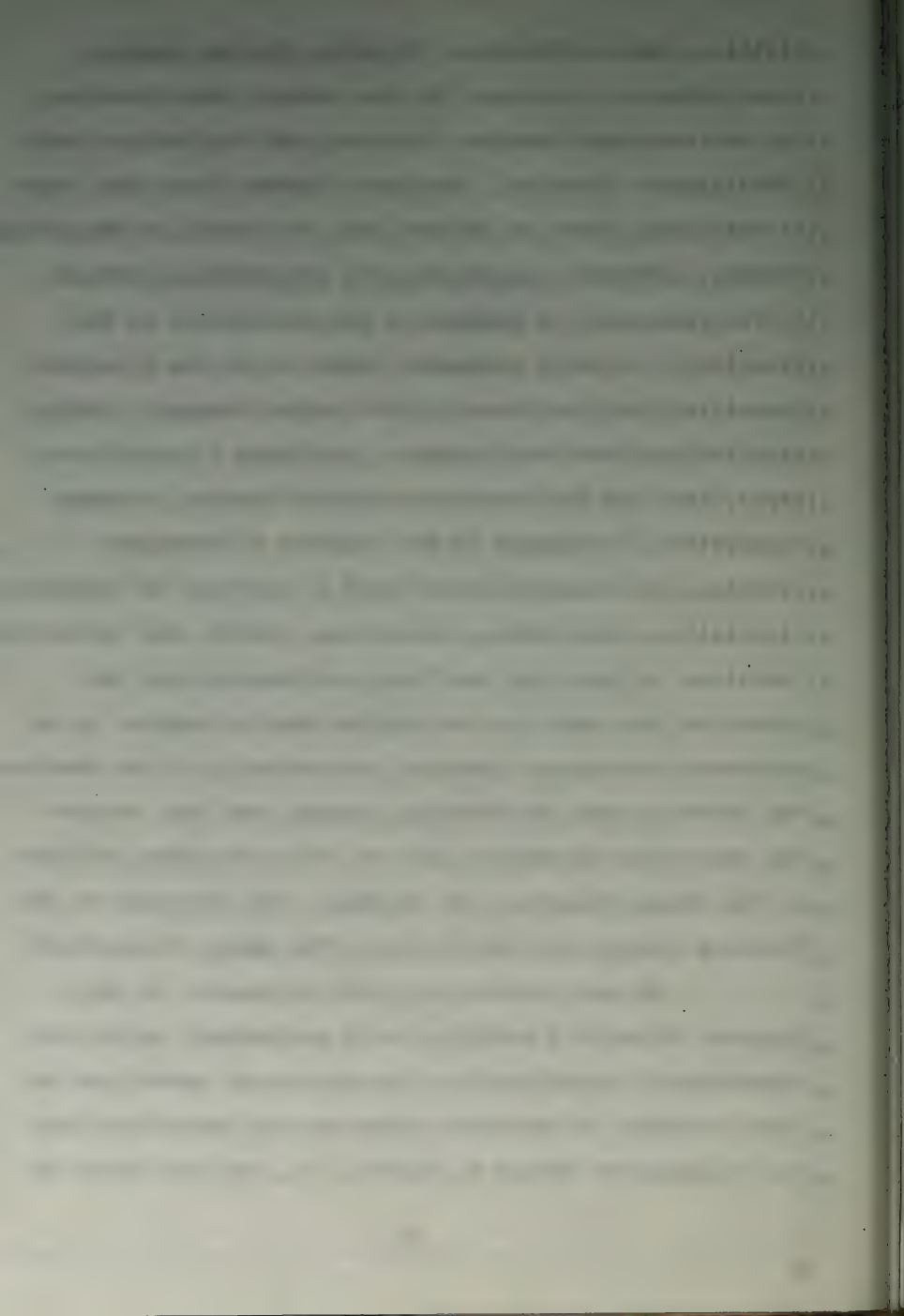
14
15 B. The District Court's Finding That There
16 Is Reasonable Cause To Believe That The
17 Los Angeles Herald-Examiner Is Operated
18 Autonomously And Independently Of The
19 San Francisco Examiner, The San Francisco
20 Chronicle And The San Francisco Printing
21 Company Was Not Clearly Erroneous.

22 The Court below found that there is reasonable
23 cause to believe that The Hearst Corporation, which has its
24 principal office in New York City, maintains seven news-
25 paper divisions consisting of the following: The Baltimore
26 News American Division, The Boston Record American-Advertiser

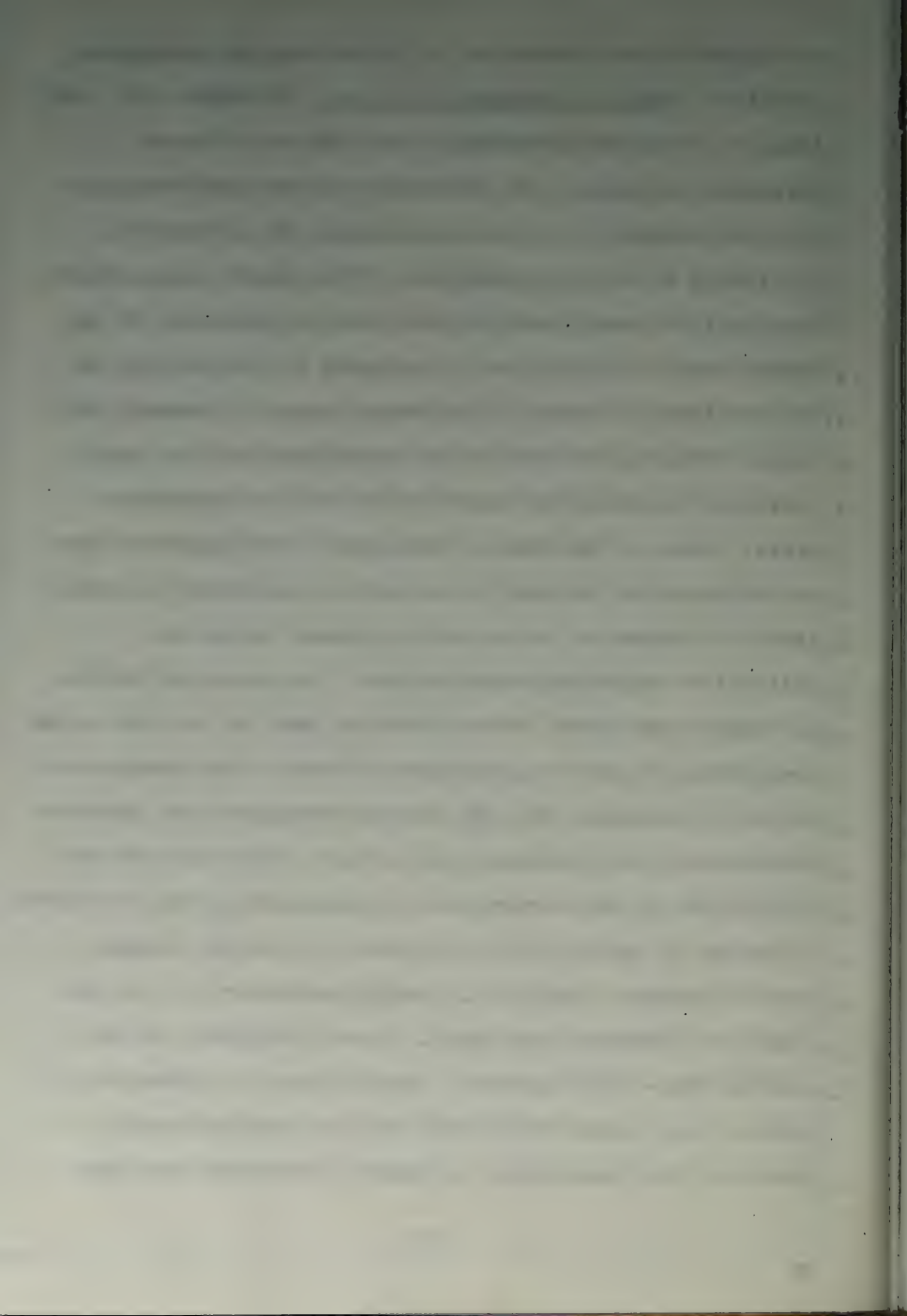


1 Division, Capital Newspaper Division, The Los Angeles
2 Herald-Examiner Division, The San Antonio Light Division,
3 The San Francisco Examiner Division, and The Seattle Post-
4 Intelligencer Division. The Court further found that there
5 is reasonable cause to believe that the Chronicle Publishing
6 Company, a Nevada corporation with its principal offices
7 in San Francisco, is engaged in the publication in San
8 Francisco of a daily newspaper known as the San Francisco
9 Chronicle; that the Chronicle Publishing Company, jointly
10 with the San Francisco Examiner, publishes a Sunday news-
11 paper; that the San Francisco Printing Company, a Nevada
12 corporation, is engaged in the business of newspaper
13 printing, in connection with which it performs the mechanical,
14 circulation, advertising, accounting, credit, and collection
15 functions for both the San Francisco Examiner and the
16 Chronicle; and that the Los Angeles Herald-Examiner is an
17 autonomous enterprise operated independently of the Examiner,
18 the Chronicle and the Printing Company; and that neither
19 the day-to-day operations nor the labor relations policies
20 of the Herald-Examiner, the Examiner, the Chronicle or the
21 Printing Company are controlled by The Hearst Corporation.

22 The many affidavits filed in support of the
23 Regional Director's petition for a preliminary injunction
24 unequivocally establish that the day-to-day operations and
25 labor policies of the Herald-Examiner are controlled only
26 by its publisher George R. Hearst, Jr., and that there is

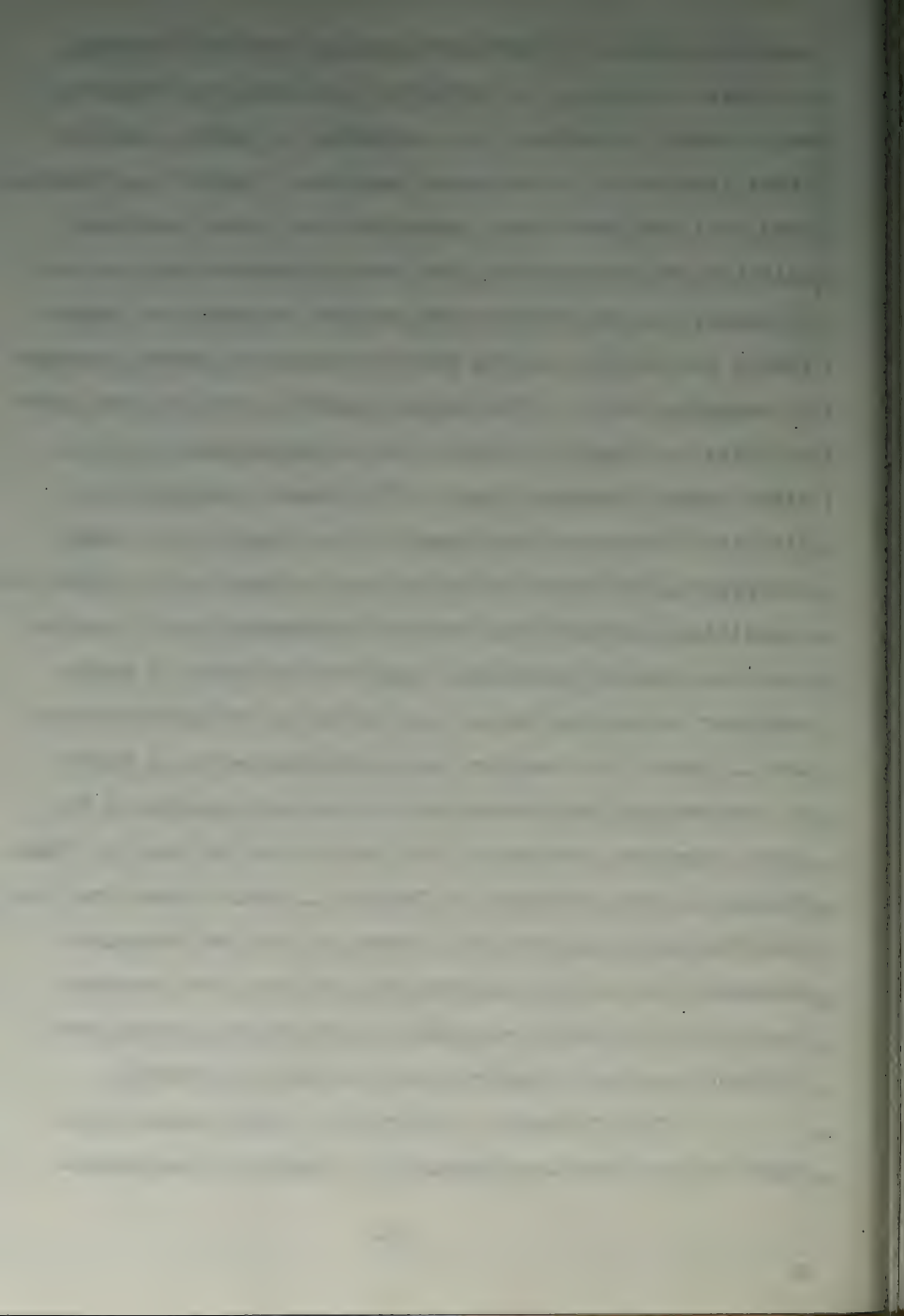


1 no "appreciable integration of operations and management
2 policies" (Poole's Warehousing, Inc., 158 NLRB 1281, 1286
3 (1966)) of the Herald-Examiner and the other Hearst
4 newspaper divisions, the Chronicle and the San Francisco
5 Printing Company. In this connection, the affidavits
6 of Richard E. Berlin, president of The Hearst Corporation,
7 show that for many years it has been the practice of the
8 Hearst Board of Directors to delegate full authority to
9 the publisher of each of the Hearst papers to manage the
10 normal affairs, the day-to-day operations and the labor
11 relations policies and negotiations of his respective
12 paper. None of the Hearst newspapers seeks approval from
13 the corporation in order to establish operating policies,
14 labor or otherwise, or to settle issues during any
15 collective bargaining negotiations. As stated by Berlin,
16 he himself has never taken an active part in the day-to-day
17 operations or labor negotiations of any of the newspapers.
18 Berlin's testimony that the Hearst newspapers are operated
19 autonomously and independently of each other and are not
20 controlled by the corporation is confirmed by the affidavits
21 of George R. Hearst, Jr., publisher of the Los Angeles
22 Herald-Examiner, Charles L. Gould, publisher of the San
23 Francisco Examiner, and Dan L. Starr, publisher of the
24 Seattle Post-Intelligencer. The affidavits of George R.
25 Hearst, Jr., demonstrate that the Los Angeles Herald-
26 Examiner is a completely autonomous enterprise and that



1 complete control is exercised locally over its business,
2 the news it prints, its editorial policies, the features
3 and columns it carries, the customers it serves, and the
4 firms from which it purchases supplies. Hearst's affidavits
5 show that the day-to-day operations and labor relations
6 policies and practices of the Herald-Examiner are carried
7 out under his supervision and control or under the super-
8 vision and control of the Herald-Examiner's general manager
9 or managing editor. The Herald-Examiner sets its own labor
10 policies and negotiates with unions independently of the
11 other Hearst newspapers and of The Hearst Corporation.
12 Its labor contracts vary greatly from those of the other
13 newspapers, and there is no uniform pattern in the collective
14 bargaining contracts the various newspapers have. Many of
15 the other Hearst newspapers negotiate as parts of multi-
16 employer bargaining units. As stated in the affidavit of
17 Dan L. Starr, the Seattle Post-Intelligencer is a member
18 of the Seattle Publishers Association and negotiates its
19 labor relations contracts as a group with the Seattle Times.
20 Similarly, the affidavit of Charles L. Gould shows that the
21 San Francisco Examiner is a member of the San Francisco
22 Newspaper Publishers Association, and that the Examiner
23 negotiates its labor relations contracts as a group with
24 the San Francisco Chronicle and the San Jose Mercury.

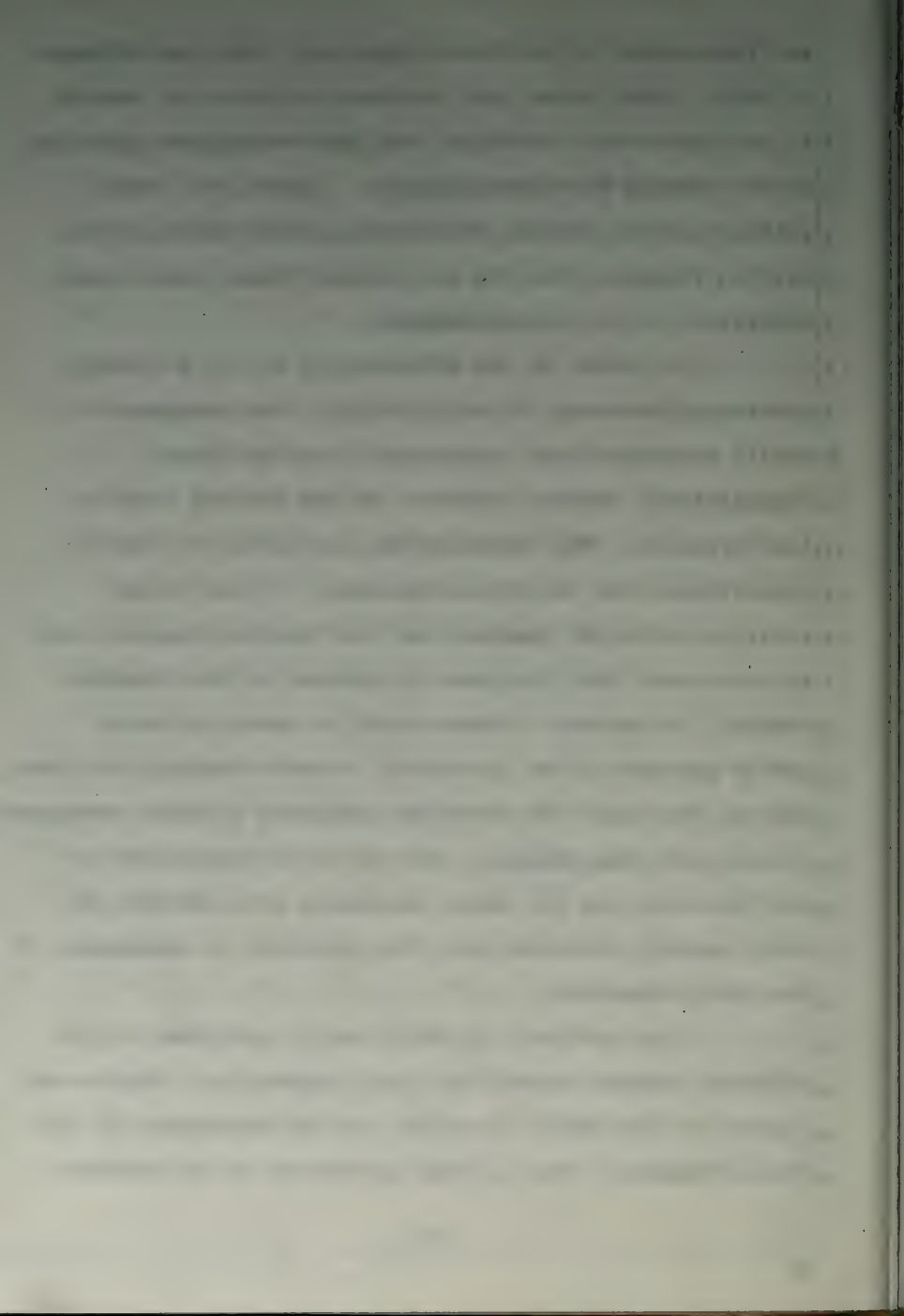
25 The affidavit of Charles L. Gould demonstrates
26 that the San Francisco Examiner is completely autonomous



1 and independent of the Herald-Examiner. And the affidavit
2 of Dan L. Starr shows that the same is true with respect
3 to the day-to-day operations and labor-management policies
4 of the Seattle Post-Intelligencer. Indeed, Mr. Starr
5 states that the Seattle Post-Intelligencer purchases its
6 cartoon features from the Los Angeles Times, the primary
7 competitor of the Herald-Examiner.

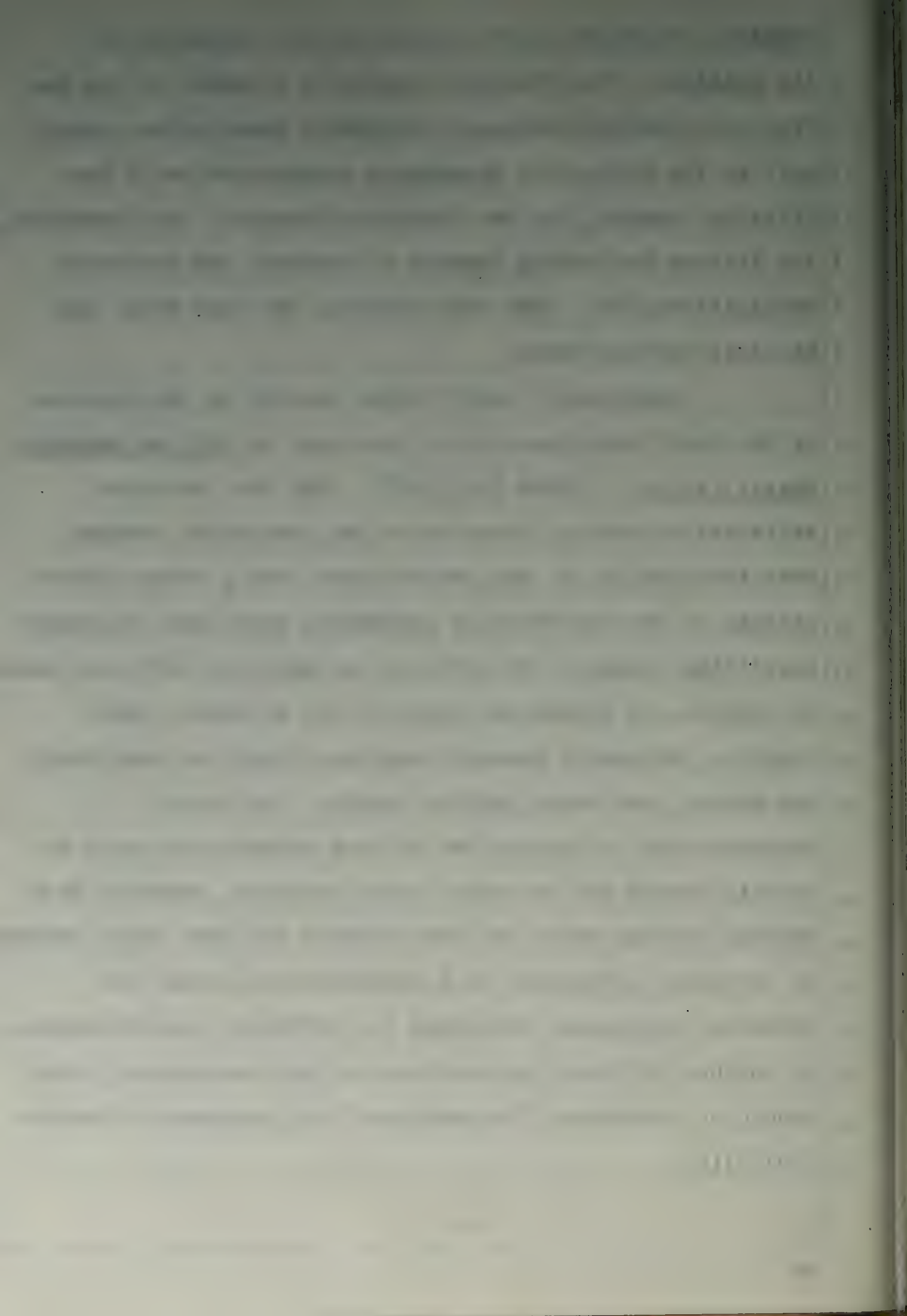
8 As shown in the affidavit of Mr. L. A. Denny,
9 Secretary-Treasurer of the Chronicle, that newspaper is
10 wholly autonomous and independent from the Hearst
11 organization. Hearst interests do not own any stock in
12 the Chronicle. The Chronicle has absolutely no ties or
13 connections with the Herald-Examiner. It has formal
14 relations with the Examiner and the Printing Company only
15 to the extent that its paper is printed by the Printing
16 Company, 50 percent of whose stock is owned by Hearst
17 and 50 percent by the Chronicle. Notwithstanding this fact,
18 and the fact that the Chronicle publishes a Sunday newspaper
19 jointly with the Examiner, the day-to-day operations of
20 the Chronicle and its labor management policies are not
21 even remotely connected with the operation or management of
22 the Herald-Examiner.

23 The affidavit of Wells Smith, president of the
24 Printing Company, shows that that corporation's day-to-day
25 operations are wholly divorced from the management of the
26 Herald-Examiner. Nor are the operations of the Printing



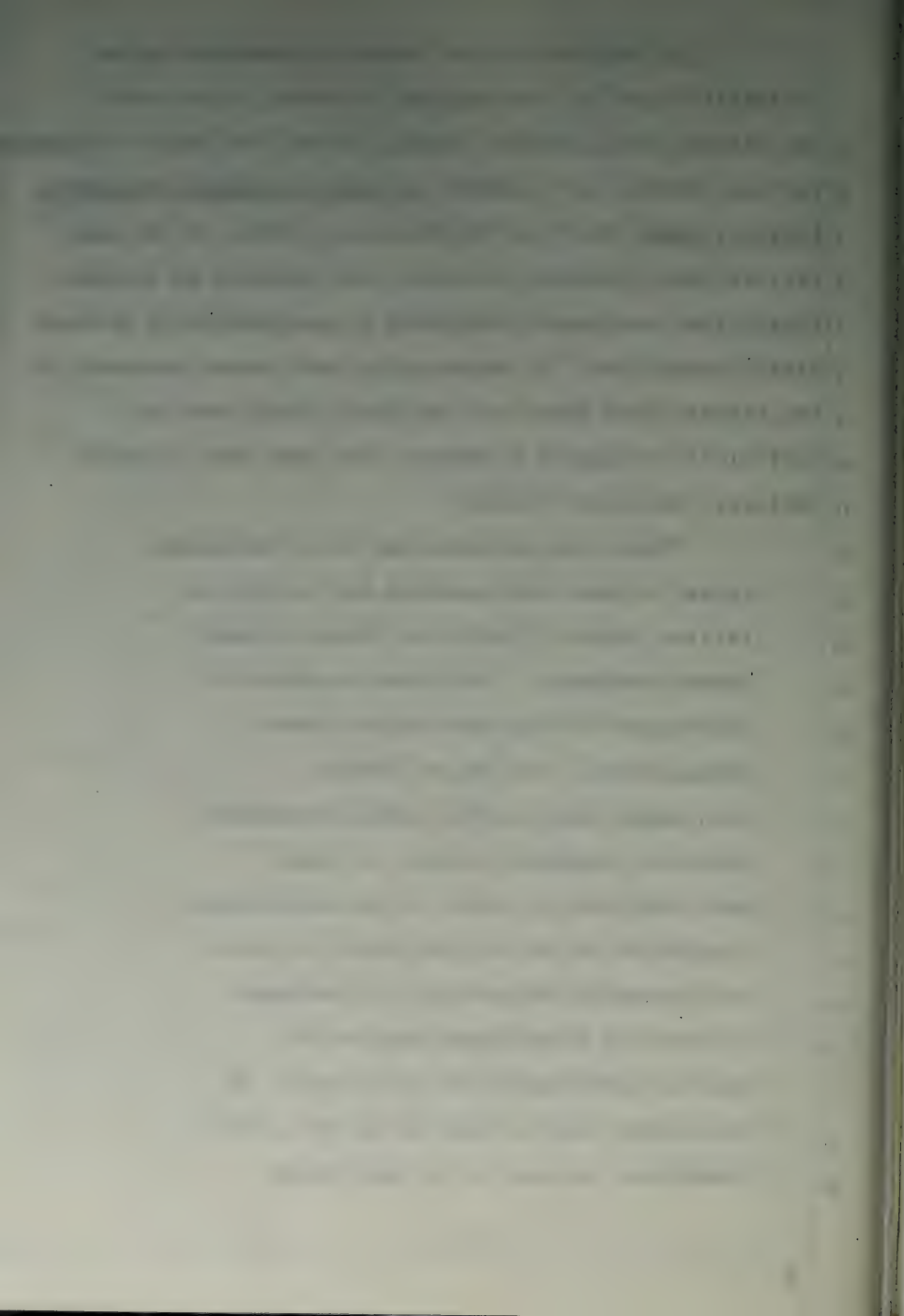
1 Company controlled in any respect by the Chronicle or
2 the Examiner. The Printing Company is a member of the San
3 Francisco-Oakland Newspaper Publishers Association, which
4 acts as the collective bargaining representative of the
5 Printing Company, the San Francisco Examiner, the Chronicle,
6 the Tribune Publishing Company of Oakland, and Northwest
7 Publications, Inc. (San Jose Mercury, San Jose News, and
8 San Jose Mercury News).

9 Appellants' brief relies heavily on the decision
10 of the Board more than thirty years ago in William Randolph
11 Hearst, et al., 2 NLRB 530 (1937). But that decision
12 reflected a state of facts which has long since changed.
13 More importantly, it was decided more than a decade before
14 passage of the Taft-Hartley amendments which made secondary
15 boycotting illegal. It involved the entirely different issue
16 of whether, in assessing liability for an unfair labor
17 practice, allegedly separate employers could be considered
18 one person, and hence jointly liable. The Board's
19 determination of whether two or more enterprises would be
20 jointly liable for an unfair labor practice, rendered in a
21 factual setting which has been history for over three decades,
22 is obviously irrelevant to a determination, under new
23 statutory provisions involving far different considerations,
24 of whether different enterprises as they are operated today
25 should be considered "one employer" for purposes of Section
26 8(b)(4)(B).



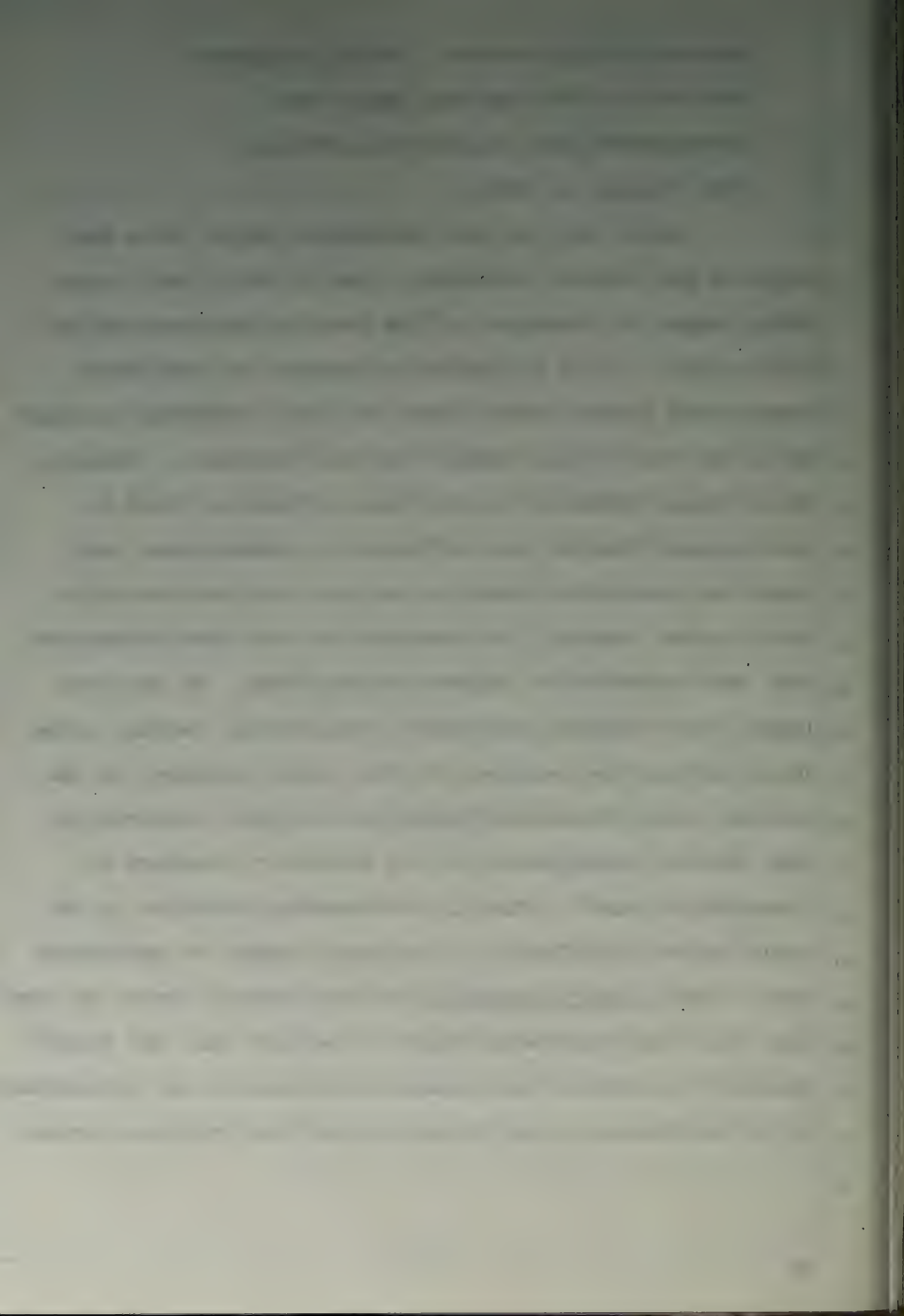
1 In addition to the evidence presented by the
2 affidavits filed by the Regional Director, this Court
3 can clearly take judicial notice, as did the Court of Appeals
4 for the District of Columbia in Miami Newspaper Pressmen's
5 Local v. NLRB, 322 F.2d 405 (D.C.Cir. 1963), of the many
6 factors which operate to isolate and separate as distinct
7 enterprises newspapers published in geographically distant
8 urban communities. In emphasizing that common ownership of
9 the Detroit Free Press and the Miami Herald was not
10 sufficient to support a finding that they were a single
11 employer, the court stated:

12 "These two metropolitan daily newspapers
13 appear to have had separate and largely un-
14 related lives of their own, despite their
15 common ownership. Published hundreds of
16 miles apart in two distinctive urban
17 communities of the United States,
18 each paper went its way under independent
19 direction supplied locally, as they
20 must have done in order to be successfully
21 responsive to the varying needs of their
22 two unrelated readerships. A newspaper
23 reflects in significant measure the
24 peculiar personality of its locale. To
25 the extent that it does so in fact, its
26 commercial success is to that degree



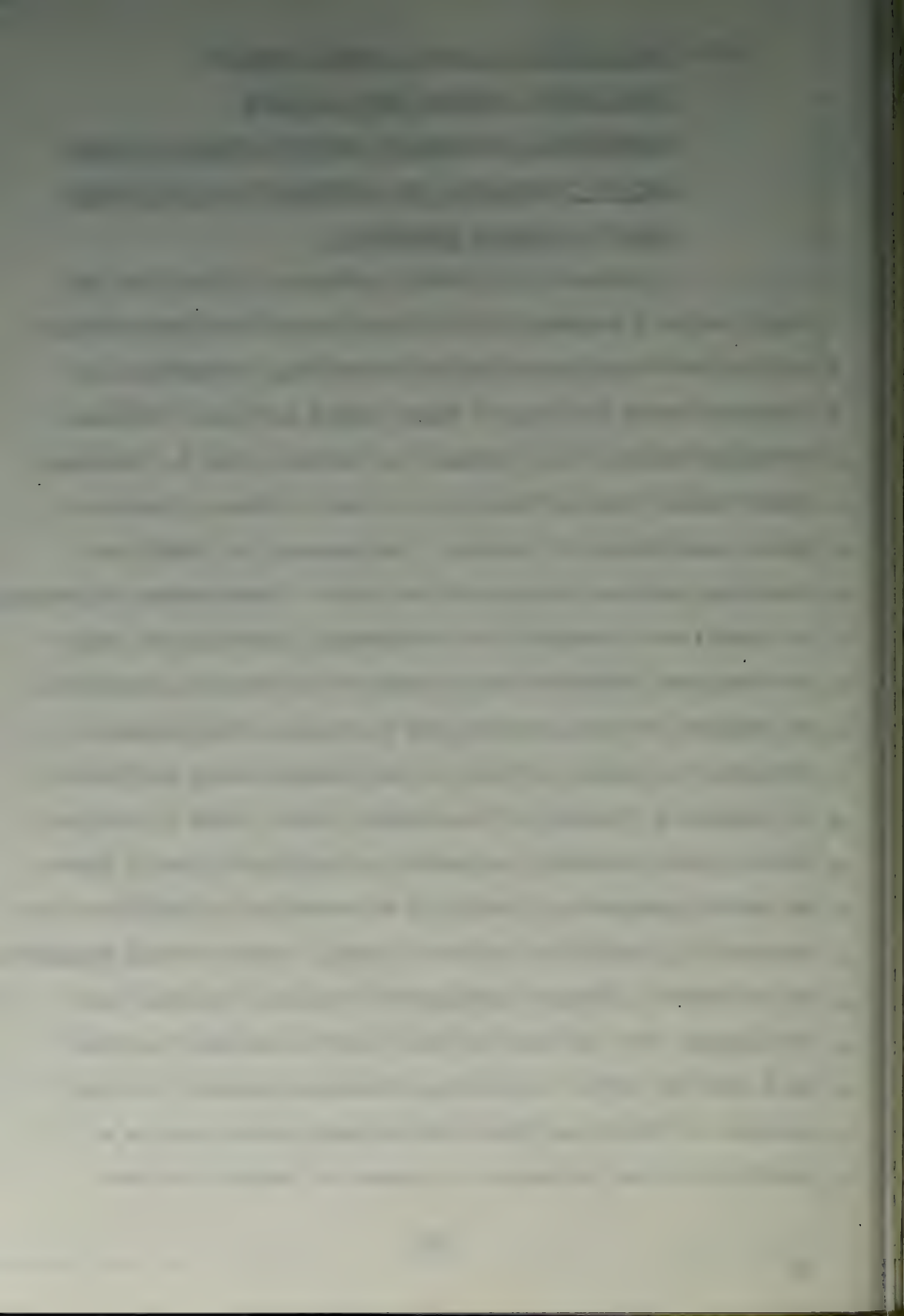
1 correspondingly assured. Wise publishers
2 know this to be true and shape their
3 arrangements and policies accordingly."
4 (322 F.Supp. at 409).

5 Here, too, we have newspapers which "have had
6 separate and largely unrelated lives of their own", each
7 being shaped in response to "the peculiar personality of
8 its locale." It is difficult to conceive of two urban
9 communities between which there is such a striking contrast
10 as in the case of Los Angeles and San Francisco. Clearly,
11 the evidence presented in the many affidavits filed by
12 the Regional Director was sufficient to demonstrate that
13 there was reasonable cause to believe that the Chronicle,
14 the Printing Company, the Examiner and the Herald-Examiner
15 are each operated as separate enterprises. At the very
16 least, this evidence presented a substantial factual issue
17 which can only be resolved, in the first instance, by the
18 National Labor Relations Board; and the mere existence of
19 that factual issue satisfies the statutory standard of
20 "reasonable cause". Finally, addressing ourselves to the
21 issue before this Court, it obviously cannot be maintained
22 that it was clearly erroneous for the District Court to find
23 that there was reasonable cause to believe that the Herald-
24 Examiner is operated and managed autonomously and independent-
25 ly of the Examiner, the Chronicle, and the Printing Company.



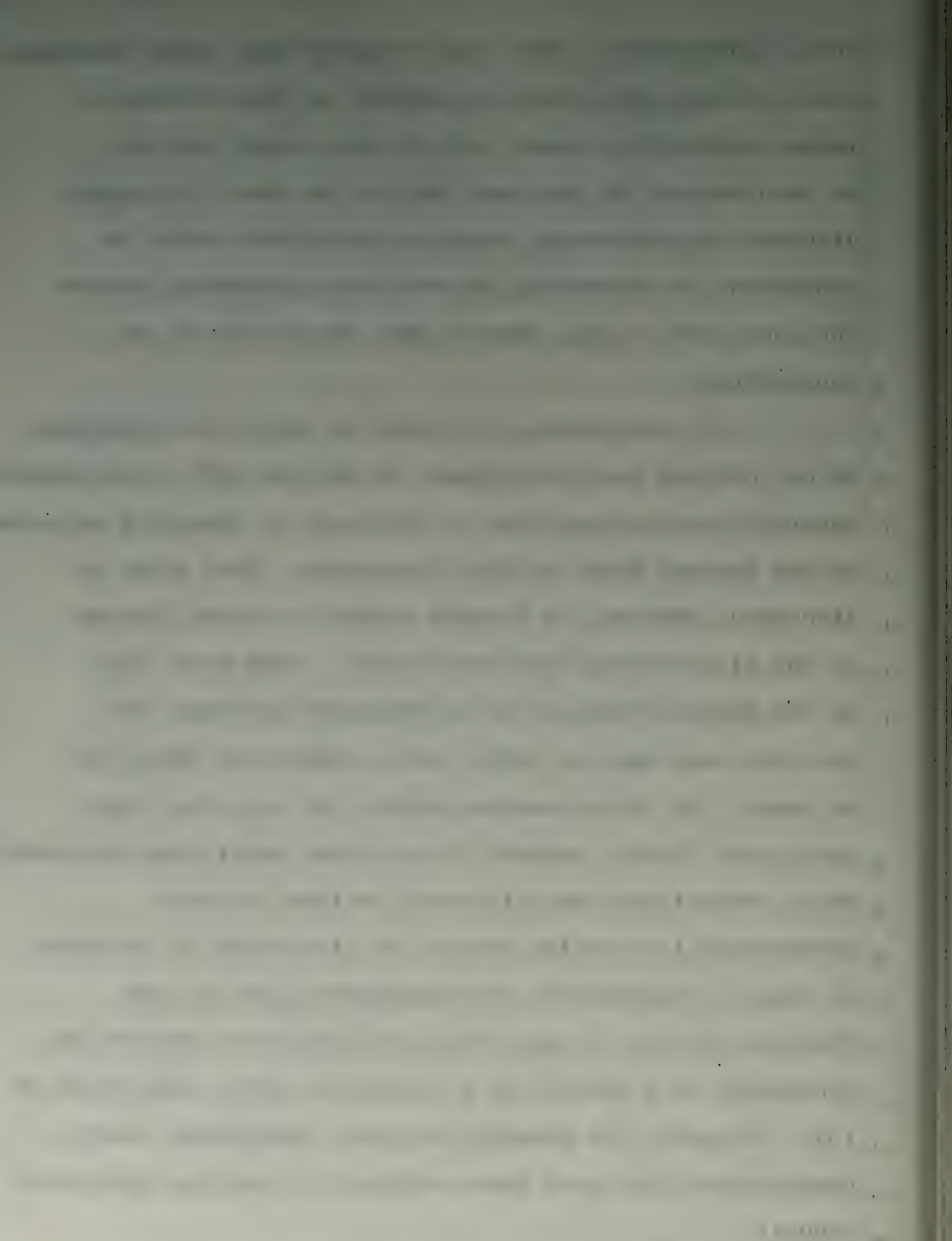
1 III. THE DISTRICT COURT'S ORDER DENYING
2 APPELLANTS' REQUEST FOR AN ORDER
3 PERMITTING DEPOSITIONS AND/OR INTERROGATORIES
4 AND/OR COMPELLING THE ATTENDANCE OF WITNESSES
5 WAS NOT CLEARLY ERRONEOUS.

6 On January 23, 1968 Appellants filed with the
7 Court below a request for an order permitting depositions
8 and/or interrogatories and/or compelling attendance at
9 the show cause hearing of eight named persons: William
10 Randolph Hearst, Jr.; Richard E. Berlin; John B. Siefken;
11 Frank Massi; George Hearst, Jr.; Dan L. Starr; Charles L.
12 Gould; and Harold E. Kelsey. On January 30, 1968 the
13 Charging Parties filed with the Court a memorandum objecting
14 to Appellants' request for discovery, pointing out that
15 the Regional Director had already filed twenty affidavits
16 in support of his position and that since the evidence
17 contained in these affidavits was demonstrably sufficient
18 to support a finding of reasonable cause, even if contra-
19 dicted, the discovery requested by Appellants would serve
20 no useful purpose and would be an exercise in futility. On
21 January 31, 1968, the District Court, after hearing arguments
22 on the matter, denied Appellants' request, holding and
23 concluding that in view of the Court's limited function
24 in a Section 10(1) proceeding, discovery merely for the
25 purpose of eliciting facts which would give rise to a
26 conflict in the evidence or issues of credibility was



1 wholly unwarranted. The Court observed that since discovery
2 would at best only create a conflict in the evidence or
3 raise credibility issues, all of which would have to
4 be resolved not by the Court but by the Board, to permit
5 discovery to the extent sought by Appellants would be
6 tantamount to converting the ancillary proceeding before
7 the Court into a full inquiry into the merits of the
8 controversy.

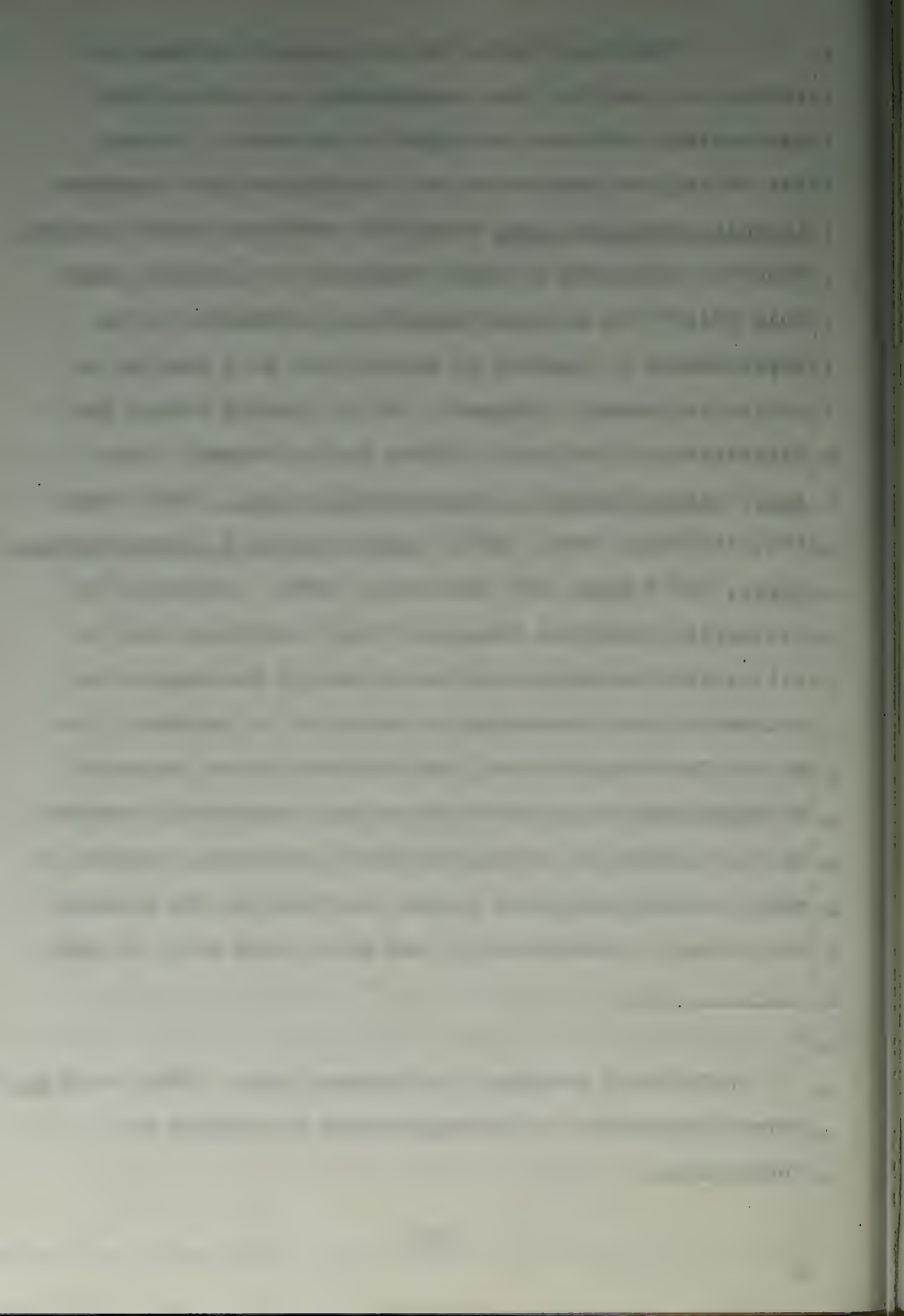
9 At the outset, it should be noted that Appellees
10 do not contend that respondents in Section 10(1) proceedings
11 generally are not entitled to the right of discovery accorded
12 by the Federal Rules of Civil Procedure. That right of
13 discovery, however, is clearly subject to being limited
14 at the discretion of the trial court. Thus Rule 30(b)
15 of the Federal Rules of Civil Procedure provides that
16 the court may make an order that a deposition shall not
17 be taken. In the proceeding below, the very fact that
18 Appellants filed a request for an order permitting discovery
19 was a recognition that discovery incident to such
20 proceedings is a matter within the discretion of the court.
21 In these circumstances, the memorandum filed by the
22 Charging Parties in opposition to Appellants' request was
23 tantamount to a motion for a protective order under Rule 30
24 (b). Moreover, the Charging Parties' memorandum clearly
25 demonstrated that good cause existed for denying Appellants'
26 request.



1 The Court below did not purport to base its
2 ruling on a holding that respondents in Section 10(1)
3 proceedings are never entitled to discovery. Rather,
4 its ruling was predicated on a conclusion that discovery
5 in this particular case would not serve any useful purpose.
6 Thus the situation is quite analogous to a motion under
7 Rule 56(e)* for an order permitting affidavits to be
8 supplemented or opposed by depositions at a hearing on
9 motion for summary judgment. It is clearly within the
10 discretion of the court to deny such a request. See,
11 e.g., United States v. Johns-Manville Corp., 259 F.Supp.
12 440, 455 (E.D. Penn. 1966); United States v. Johns-Manville
13 Corp., 237 F.Supp. 893 (E.D. Penn. 1965). Discovery is
14 ordinarily justified because of the likelihood that it
15 will elicit evidence which might have a bearing on the
16 outcome of the proceedings to which it is incident. But
17 as the Court below noted, the discovery here requested
18 by Appellants could not have had any conceivable bearing
19 on the outcome of the Section 10(1) proceeding because at
20 most it could only have raised conflicts in the evidence
21 and issues of credibility. And as we have seen, in Rule

22 _____
23 *

24 Rule 56(e) provides, in relevant part: "The court may
25 permit affidavits to be supplemented or opposed by
26 depositions. . . ."



1 10(1) proceedings the very existence of substantial
2 questions of fact or issues of credibility ipso facto es-
3 tablishes reasonable cause. It is not uncommon for a court
4 to limit discovery when it is convinced that it will serve
5 no reasonable purpose, as when it appears that a plaintiff's
6 case against a defendant whom he seeks to depose is wholly
7 unfounded. See, e.g., Waldron v. British Petroleum Co.,
8 Ltd., 4 F.R.Serv.2d 30b.23, Case 1 (S.D.N.Y. 1961).

9 As we have seen in Part I of this brief, the
10 district court has but a limited role in a Section 10(1)
11 proceeding. As this Court has stated:

12 "ordinarily a dispute as to a material
13 question of fact precludes a judgment on the
14 pleadings, but the dispute as to the question
15 raised by the pleadings in the instant case
16 was not within the province of the district
17 court to resolve; it was one for the Board
18 to decide. It seems apparent, and the district
19 court so found, that the Board could find
20 either that the certification covered by
21 the three Goodrich employees at the Union
22 Rock Plant or that it did not. That being
23 the case, there existed reasonable cause
24 raised by the pleadings that appellant
25 was engaging in an unfair labor practice,
26 thus justifying the issuance of the injunction."

1 (Local No. 83, Construction Drivers Union v.
2 Jenkins, 308 F.2d 516, 517 (9th Cir. 1962).

3 All that the statutory yardstick of "reasonable
4 cause" requires "is the prima facie establishment of facts
5 from which an inference might be drawn that the charge is
6 true. If this be so, injunction issues, whether the
7 charges are ultimately proved true in the proceedings
8 before the director or not." Kennedy v. Los Angeles Joint
9 Executive Board of Hotel and Restaurant Employees, 192 F.
10 Supp. 339, 341 (S.D.C 1. 1961). "The court may not resolve
11 conflicting factual evidence in questions of credibility
12 if the Board might reasonably resolve those issues in
13 favor of the plaintiff." Fusco v. Richard W. Kasse Baking
14 Co., 205 F.Supp. 459, 463 (N.D.Ohio 1962). See also McLeod
15 v. Local 478, Int'l. Union of Operating Engineers, 278 F.
16 Supp. 22, 30 (D.Conn. 1967). In sum, all that is required
17 is "credible evidence, establishing a prima facie case."
18 Greene v. Bangor Bldg. Trades Council, 165 F.Supp. 902,
19 (N.D.Me. 1958).

20 ". . . The evidence need not establish
21 a violation. It is sufficient to sustain
22 the District Court's finding and conclusion
23 if there be any evidence which might together
24 with all the reasonable inferences that might
25 be drawn therefrom supports a conclusion that
26 there is reasonable cause to believe that a

THE HISTORY OF THE UNITED STATES

FROM THE FIRST SETTLEMENTS TO THE PRESENT

BY JAMES M. SMITH, LL.D., OF THE UNIVERSITY OF CHICAGO

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1 violation had occurred." (Madden v.
2 International Hod Carriers, 277 F.2d 688,
3 692 (7th Cir. 1960).

4 That the discovery requested by Appellants
5 would have been an exercise in futility is amply demonstrated
6 by the court's decision in Jaffe v. Henry Heide, Inc.,
7 115 F.Supp. 52 (S.D.N.Y. 1953). This was a Section 10(j)
8 proceeding in which there were substantial conflicts in
9 the evidence developed at the hearing. Nonetheless,
10 the court held that the resolution of such conflicts
11 was for the National Labor Relations Board, and not the
12 court:

13 "In this proceeding the court has
14 power only to grant or deny intermediate
15 relief pending the Board's final disposition
16 of the complaints filed by the petitioner.
17 Accordingly, the issue here is only whether
18 on the evidence presented the Board could
19 reasonably find that Heide committed unfair
20 labor practices. There is the sharpest
21 conflict in the testimony of Goddard and
22 Heide as to the alleged agreement between
23 the latter and the president of Local 452.
24 There is also conflicting testimony as to
25 whether Heide assigned organizers of Local
26 452 to supervisory positions for which they

THE UNIVERSITY OF CHICAGO
THE DIVISION OF THE PHYSICAL SCIENCES
DEPARTMENT OF CHEMISTRY

REPORT ON THE PROGRESS OF THE RESEARCHES OF THE

LABORATORY OF THE DIVISION OF THE PHYSICAL SCIENCES
DURING THE YEAR 1900-1901
BY
J. H. VAN VLECK, PH.D.
ASSISTANT PROFESSOR OF CHEMISTRY
AND
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1 were not qualified, in order to enable them
2 to move freely from one department to
3 another and thus facilitate their recruiting
4 activities; and as to whether Heide deviated
5 from its normal practice in requiring written
6 confirmation of the check-off cards
7 presented by Local 50 in July, 1952.

8 These conflicts raise questions of
9 credibility which the Board must
10 resolve." (115 F.Supp. at 47).

11 The foregoing principle would be applicable
12 to any of the forms of discovery that were requested by
13 Appellants. In their request, Appellants did not
14 specifically contend that on the basis of the petition
15 and the affidavits before the Court there was not
16 reasonable cause to believe that the Act had been violated.
17 Nor did they contend that the Regional Director had acted
18 arbitrarily or capriciously. The issue on which respondents
19 sought discovery was characterized by them as the "limited
20 area of the question of centralized control of the Hearst
21 enterprise, and the inter-relationships among the various
22 divisions of the Hearst Corporation." With respect to
23 that issue, Appellants stated: "Affidavits of George R.
24 Hearst, Jr., Charles L. Gould, Richard E. Berlin, Dan L.
25 Starr and Harold E. Kelsey have been previously filed by
26 petitioner. These affidavits, although they tend on their

The first of these is the fact that the

the second is the fact that the

the third is the fact that the

the fourth is the fact that the

the fifth is the fact that the

the sixth is the fact that the

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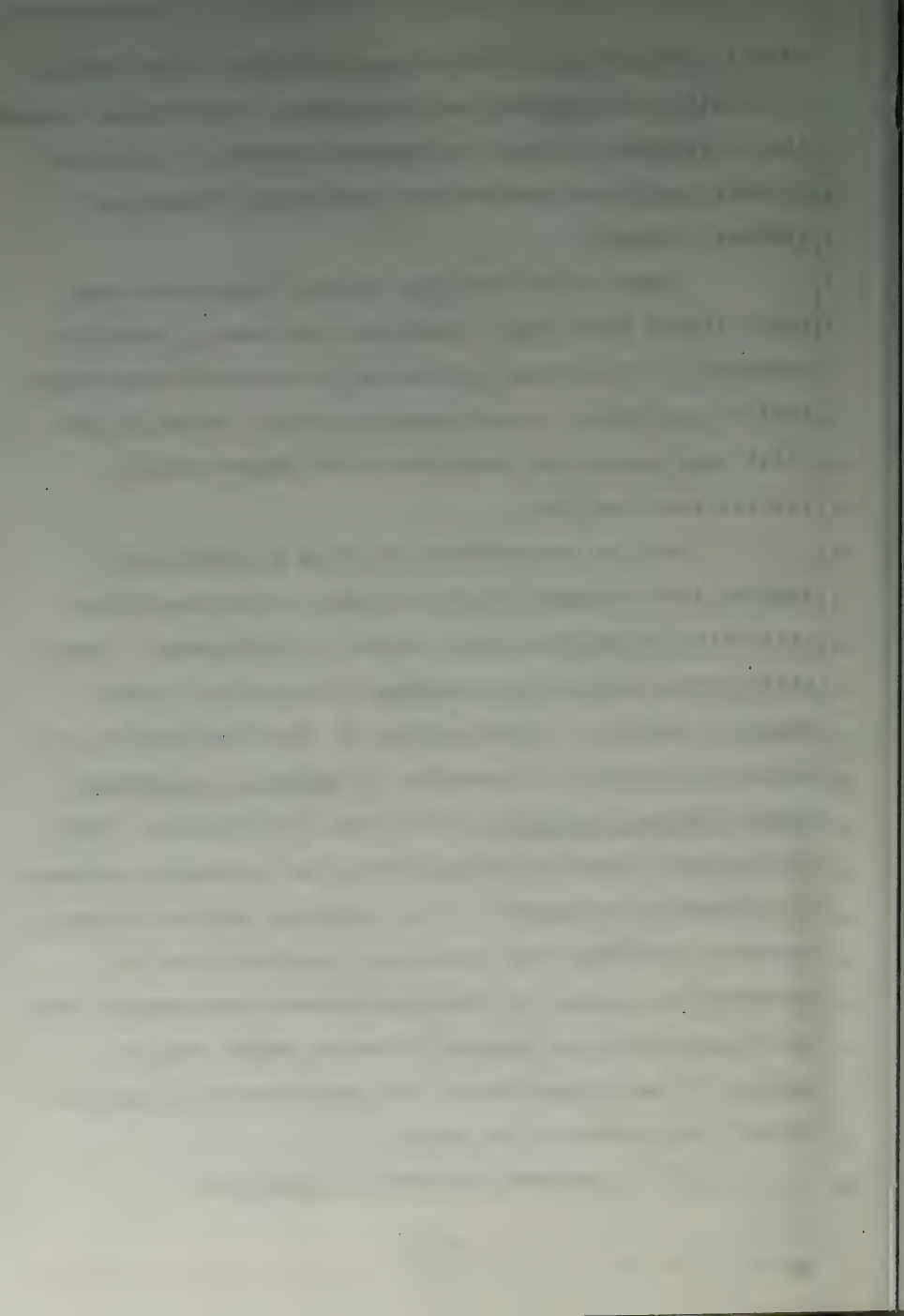
the twenty-fifth is the fact that the

1 face to indicate that the various divisions of the Hearst
2 Corporation are separate and autonomous, nevertheless reveal
3 the likelihood that much information tending to give the
4 opposite may have been omitted from these affidavits."
5 (Emphasis added).

6 Thus it is clear that even if Appellants had
7 been allowed some form of discovery and even if they had
8 succeeded in eliciting information or evidence which might
9 tend to contradict the affidavits on file, it would have
10 still been beyond the function of the Court below to
11 resolve such conflict.

12 Nor do the authorities cited by Appellants
13 support their argument that the Court below abused its
14 discretion in denying their request for discovery. Those
15 cases merely involved proceedings in which the courts
16 deemed it proper, in the exercise of their discretion, to
17 permit discovery. For example, in Madden v. Milk Wagon
18 Drivers Union, Local 753, 229 F.Supp. 490 (N.D.Ill. 1964),
19 the Regional Director had apparently not presented evidence
20 by affidavits in support of his position, and accordingly,
21 the court held that the respondents were entitled to
22 discovery as a means of obtaining advance knowledge of the
23 facts upon which the Regional Director would rely in
24 support of the allegations of his petition for injunctive
25 relief. As stated by the court,

26 ". . . Unless discovery is permitted



1 in advance [of the hearing] . . . , the
2 respondent will face the possibilities
3 of surprise and inadequate preparation
4 which the Federal Rules were designed
5 to eliminate." (229 F.Supp. at 492).

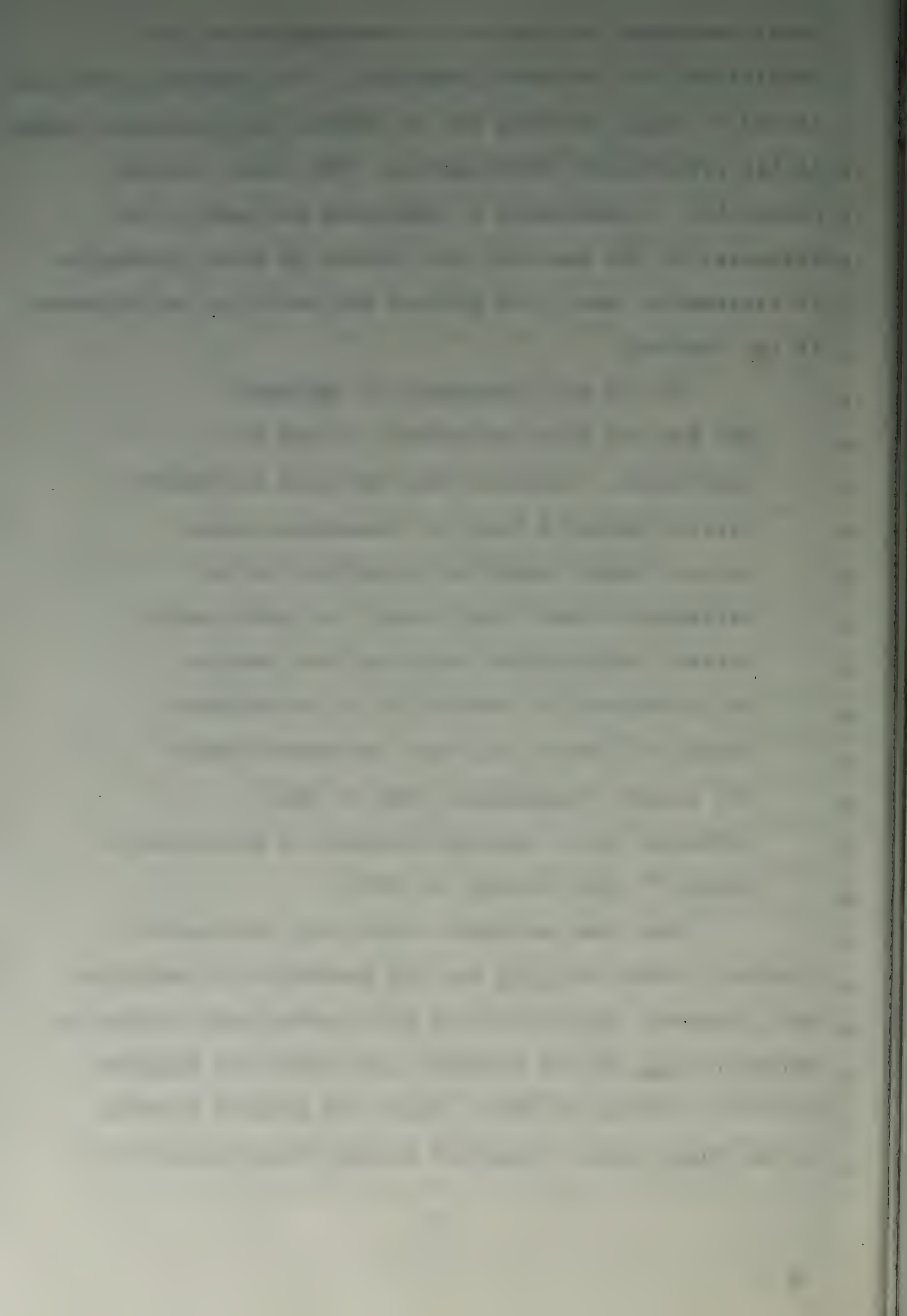
The rationale underlying the court's discovery
7 order in the foregoing case is clearly not applicable
8 here. Here, the Regional Director had presented by way
9 of twenty affidavits filed and served on respondents all
10 of the evidence upon which he intended to rely at the
11 hearing on his petition.

12 Appellants have also placed reliance upon Fusco
13 v. Richard W. Kaase Baking Co., 205 F.Supp. 459 (N.D. Ohio
14 1962). This was a Section 10(j) proceeding in which the
15 Regional Director had apparently not filed with his
16 petition affidavits setting forth the evidence upon which
17 he intended to rely at the hearing. Notices to take
18 depositions were served on Mattson, an attorney for the
19 Board's Eighth Region, and Fusco, Regional Director of the
20 Eighth Region. Subpoenas were also served on the two
21 Board agents. The Mattson subpoena called upon him to
22 testify only, and the Fusco subpoena called upon him to
23 testify and produce documents. It was agreed that Mattson
24 and Fusco would be made available for depositions, but the
25 Regional Director objected to the production of documents
26 described in the subpoena. The only question before the

1 court concerned the limits of interrogation at the
2 depositions and document production. The subpoena which was
3 served on Fusco directed him to produce all statements taken
4 in his preliminary investigation. The court ordered
5 production of statements of employees who were to be
6 witnesses at the hearing, but refused to order production
7 of statements taken from persons who would not be witnesses
8 at the hearing:

9 "As to any statements of employees
10 who are not to be witnesses, I find no
11 good cause. Assuming that any such statements
12 clearly showed a lack of 'reasonable cause'
13 the net result would be a conflict in the
14 evidence on that focal issue. As previously
15 stated, the district court may not resolve
16 any questions of credibility or evidentiary
17 conflict. Hence, any such statements would
18 not benefit respondent, even if they
19 reflected facts squarely opposed to petitioner's
20 theory." (205 F.Supp. at 464).

21 Thus the rationale underlying the court's
22 discovery order in Fusco was the prevention of surprise.
23 Here, however, Appellants had been served with affidavits
24 containing all of the evidence upon which the Regional
25 Director intended to rely. Thus, the precise holding
26 in the Fusco case, if applied herein, would have left



1 respondents exactly where they began: With copies of the
2 affidavits upon which the Regional Director relied.

3 In conclusion, since it is clear that the
4 existence of a material question of fact establishes
5 the statutory requirement of "reasonable cause", and
6 in view of the fact that the Regional Director had served
7 upon Appellants copies of twenty affidavits containing all
8 of the evidence upon which he intended to rely, the lower
9 Court's refusal to permit discovery of the nature requested
10 by Appellants was plainly not an abuse of discretion.

11
12 IV. THE DISTRICT COURT'S ORDER THAT ALL
13 EVIDENCE BE PRESENTED BY AFFIDAVITS
14 AND THAT NO ORAL TESTIMONY BE HEARD
15 UNLESS OTHERWISE ORDERED BY THE COURT
16 WAS NOT AN ABUSE OF DISCRETION.

17 It well establishes in this Circuit that a
18 preliminary injunction may be granted upon affidavits, and
19 that the presentation of oral testimony is a matter wholly
20 within the discretion of the district court. As this Court
21 stated in Ross Whitney Corp. v. Smith, 207 F.2d 190 (9th
22 Cir. 1953):

23 "In our view, a preliminary injunction
24 may be granted upon affidavits. A requirement
25 of oral testimony would in effect require
26 a full hearing on the merits and would thus

The first of these is the fact that the
 government has been unable to
 secure the necessary funds to
 carry out its policy of
 maintaining the value of the
 dollar at its present level.
 This has been due to the fact
 that the government has been
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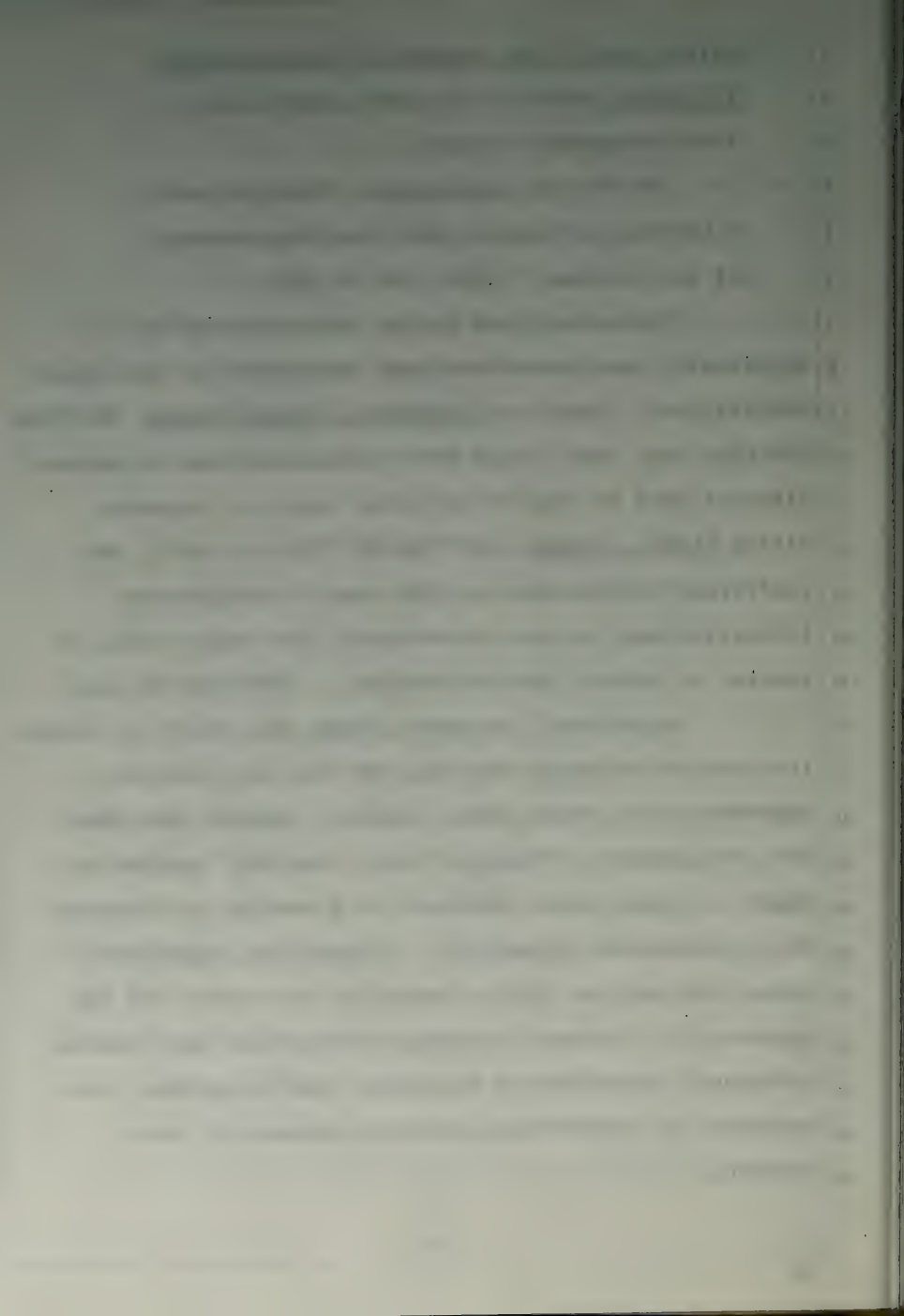
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1 defeat one of the purposes of a preliminary
2 injunction which is to give speedy relief
3 from irreparable injury

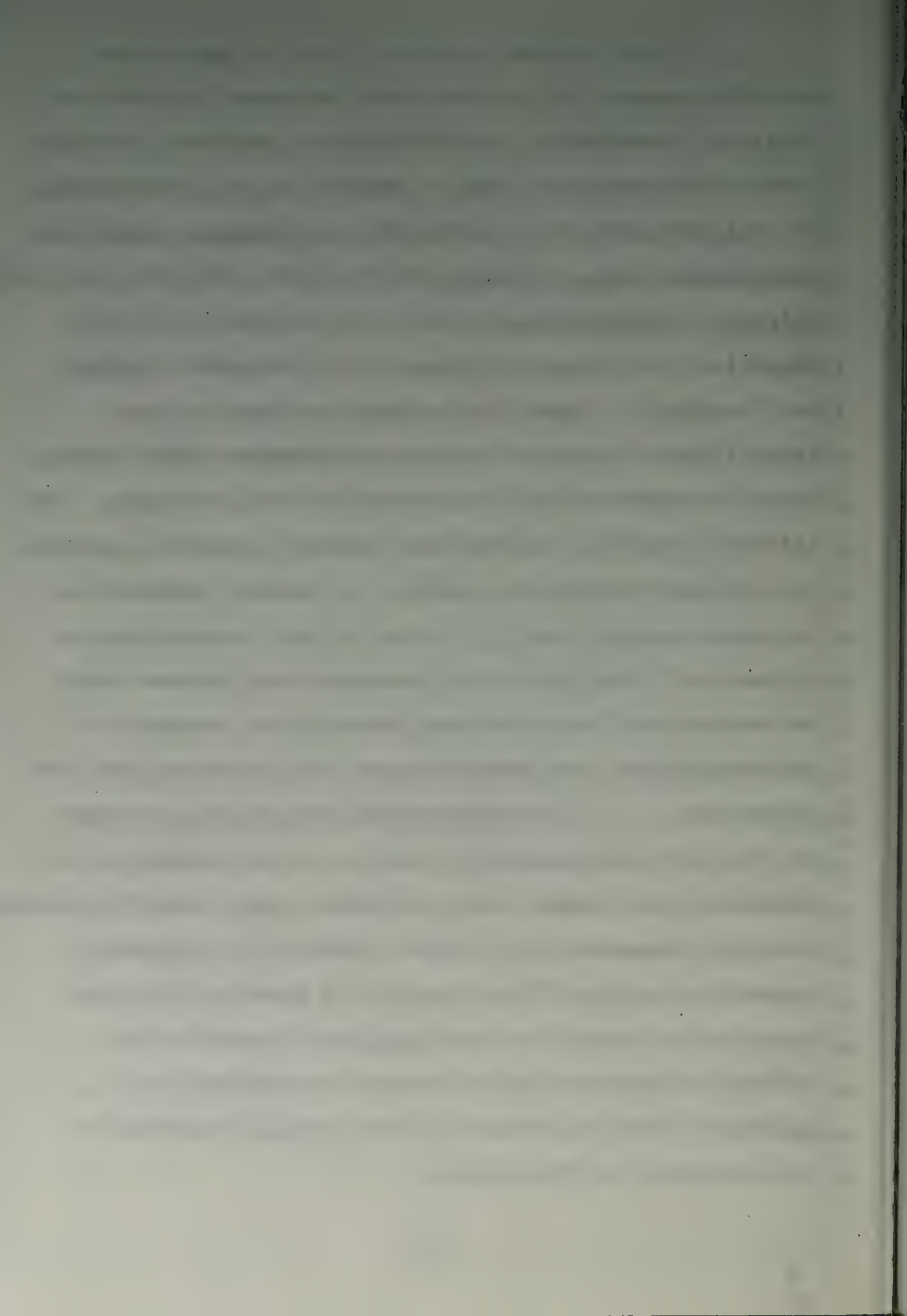
4 "As for the requirement of notice and
5 a hearing, affidavits meet the requirements
6 of due process." (207 F.2d at 198).

7 The authorities to the contrary cited by
8 Appellants, have heretofore been considered by this Court
9 and rejected. Thus, in Hoffritz v. United States, 240 F.2d
10 109 (9th Cir. 1956), this Court recognized that a contrary
11 view was held by some of the other courts of appeals,
12 citing Sims v. Greene, 161 F.2d 87 (3d Cir. 1947), but
13 reaffirmed its previous holding that "a preliminary
14 injunction may, in the discretion of the trial court, be
15 granted or denied, upon affidavits." (240 F.2d at 111).

16 Appellants, in effect, urge this Court to reverse
17 its previous holdings that Rule 65 does not require an
18 opportunity to present oral evidence, arguing that Rule
19 65's requirement of "notice" and a "hearing" implies a
20 right to present oral testimony at a hearing on a motion
21 for a preliminary injunction. In addition, Appellants
22 argue that Section 10(1)'s provision for notice and "an
23 opportunity to appear by counsel and present any relevant
24 testimony" establishes a statutory right to present oral
25 testimony at proceedings conducted pursuant to said
26 section.

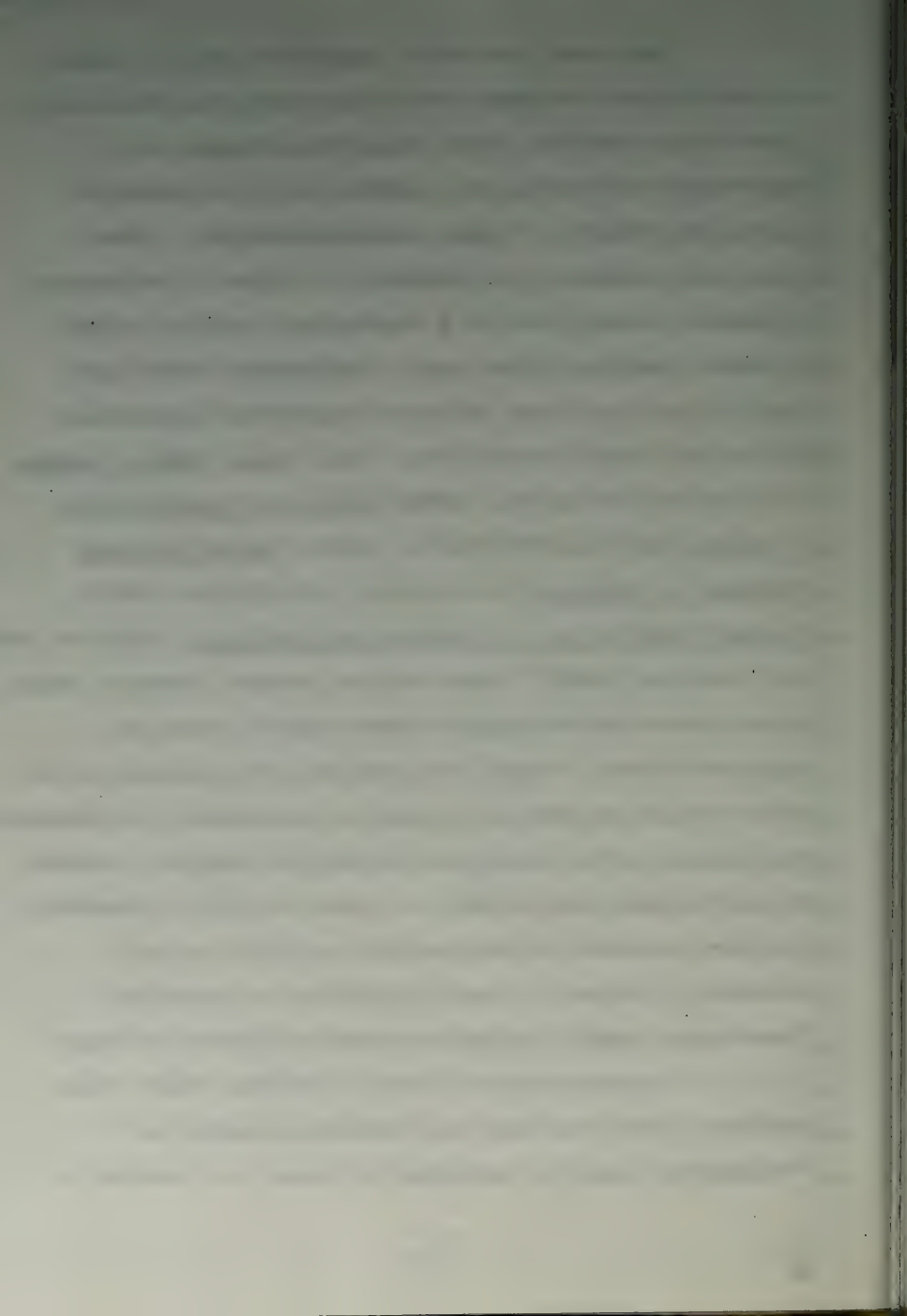


Directing our attention first to Appellants' Rule 65 argument, it is clear that the words "notice" and "hearing" contained in said Rule do not deprive a district court of discretion to deny a request for the presentation of oral testimony at a hearing on a preliminary injunction. Ross Whitney Corp. v. Smith, 207 F.2d 190, 198 (9th Cir. 1953) Hoffritz v. United States, 240 F.2d 109 (9th Cir. 1956). There is no such magic implication in the words "notice" and "hearing". Indeed, these terms are used in the Federal Rules in connection with proceedings which clearly do not contemplate the presentation of oral testimony. For instance, Rule 56, dealing with summary judgments, provides for ten days' notice on a motion for summary judgment and in subsections (c) and (d) refers to such proceedings as a "hearing". But Rule 56(c) provides that judgment shall be rendered on "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits. . . ." Notwithstanding the Rule's provision for "notice" and "hearing", there is no requirement of an opportunity to present oral testimony. And, Rule 43, dealing with the presentation of evidence generally, provides in subsection (e) that "When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties [or] . . . may direct that the matter be heard wholly or partly on oral testimony or depositions."



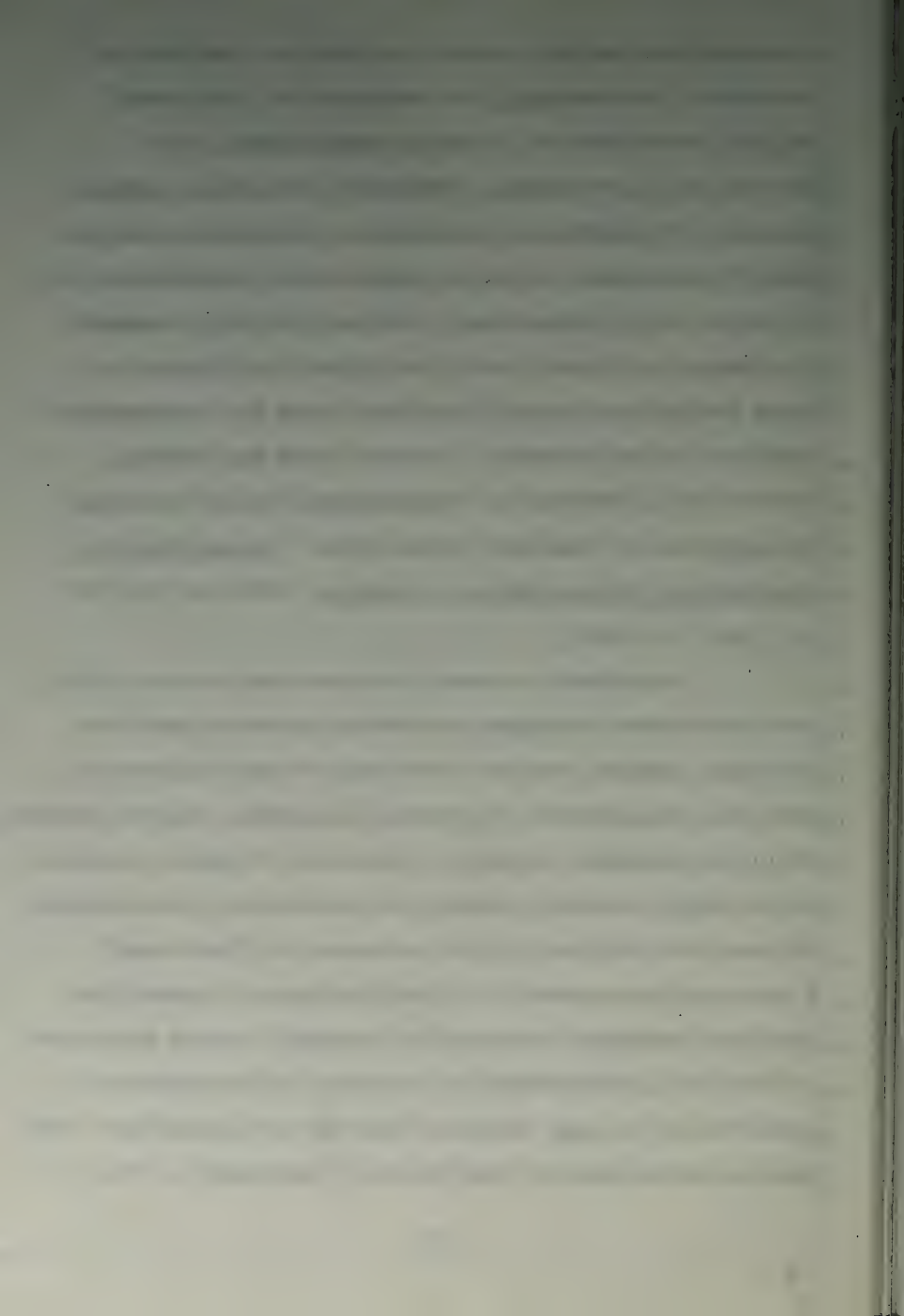
1 The cases upon which Appellants rely in support
2 of their Rule 65 argument state that where the evidence is
3 conflicting the trial court should be afforded the
4 opportunity of testing the credibility of witnesses by
5 having the benefit of their cross-examination. These
6 cases are premised on a reluctance to issue a preliminary
7 injunction where there is a substantial conflict in the
8 evidence, and they state that a preliminary injunction
9 should issue only when the facts supporting preliminary
10 relief are clearly established. See, e.g., Sims v. Greene,
11 161 F.2d 87, 88 (3d Cir. 1947); Industrial Electric Corp.
12 v. Cline, 330 F.2d 489 (3d Cir. 1964); Warner Brothers
13 Pictures v. Gittone, 110 F.2d 292, 293 (3d Cir. 1940);
14 General Electric Co. v. American Wholesale Co., 235 F.2d 606,
15 608 (7th Cir. 1956). There are two factors, however, which
16 clearly make the holdings of these Rule 65 cases in-
17 applicable here: first, in a Section 10(1) proceeding the
18 court should not feel constrained by traditional bias against
19 the issuance of a preliminary injunction when the evidence
20 is conflicting; and second, in a Section 10(1) proceeding,
21 the mere existence of substantial conflicts in the
22 evidence is in and of itself sufficient to establish
23 "reasonable cause" for the granting of injunctive relief.

24 As we have seen in Part I of this Brief, there
25 can be no doubt but that the statutory standard of
26 "reasonable cause" is satisfied if there is a showing of



1 a substantial factual issue which must be resolved by
2 the Board. Accordingly, the rationale of the cases
3 decided under Rule 65 is wholly inapplicable, in a
4 Section 10(1) proceeding. Moreover, the policy against
5 issuance of preliminary injunctions, which underlies the
6 Rule 65 decisions, is not an appropriate consideration in
7 a Section 10(1) proceeding. For Section 10(1) commands
8 the courts to discard their traditional reluctance to
9 issue preliminary injunctions when there is a substantial
10 conflict in the evidence. As this Court has stated,
11 Section 10(1) embodies a "Congressional policy favoring
12 the granting of temporary injunctions." Local No. 83,
13 Construction Drivers Union v. Jenkins, 308 F.2d 516, 517
14 n.1 (9th Cir. 1962).

15 Appellants' attempt to argue that Section 10(1)
16 sets forth more stringent procedural criteria than Rule
17 65 wholly ignores the fact that Rule 65 was tailored to
18 meet the requirements of private litigation, whereas Section
19 10(1) was intended to reflect standards of public interest
20 and a policy favoring issuance of preliminary injunctions.
21 To read into Section 10(1)'s reference to "testimony"
22 a statutory requirement of "oral testimony" ignores the
23 fact that whenever Congress has intended to make provision
24 for the oral presentation of evidence, it has referred
25 specifically to oral testimony and has not relied upon that
26 meaning being implied from the word "testimony". For



1 example, Rule 43(e), relating to the presentation of
2 evidence at hearings on motions, provides:

3 "When a motion is based on facts not
4 appearing of record the court may hear the
5 matter on affidavits presented by the respective
6 parties, but the court may direct the matter
7 be heard wholly or partly on oral testimony or
8 depositions."

9 Had Congress intended to impose a requirement
10 that Section 10(1) proceedings be conducted on the basis
11 of oral testimony, it surely would have made explicit
12 provision therefor. For example, Section 7 of the Norris-
13 LaGuardia Act (29 U.S.C. § 107) explicitly provides:

14 "No court of the United States shall
15 have jurisdiction to issue a temporary or
16 permanent injunction in any case involving
17 or growing out of a labor dispute . . . except
18 after hearing the testimony of witnesses in
19 open court (with opportunity for cross-
20 examination) . . . and testimony in opposition
21 thereto. . . ."

22 At the time Congress enacted Section 10(1),
23 the Senate had before it a proposal by Senator Ball which
24 would have modified Section 10(1) by making applicable
25 the requirements of Section 7 of the Norris-LaGuardia Act.
26 (93 Cong. Rec. 4887, 5036, 5039). Senator Ball stated

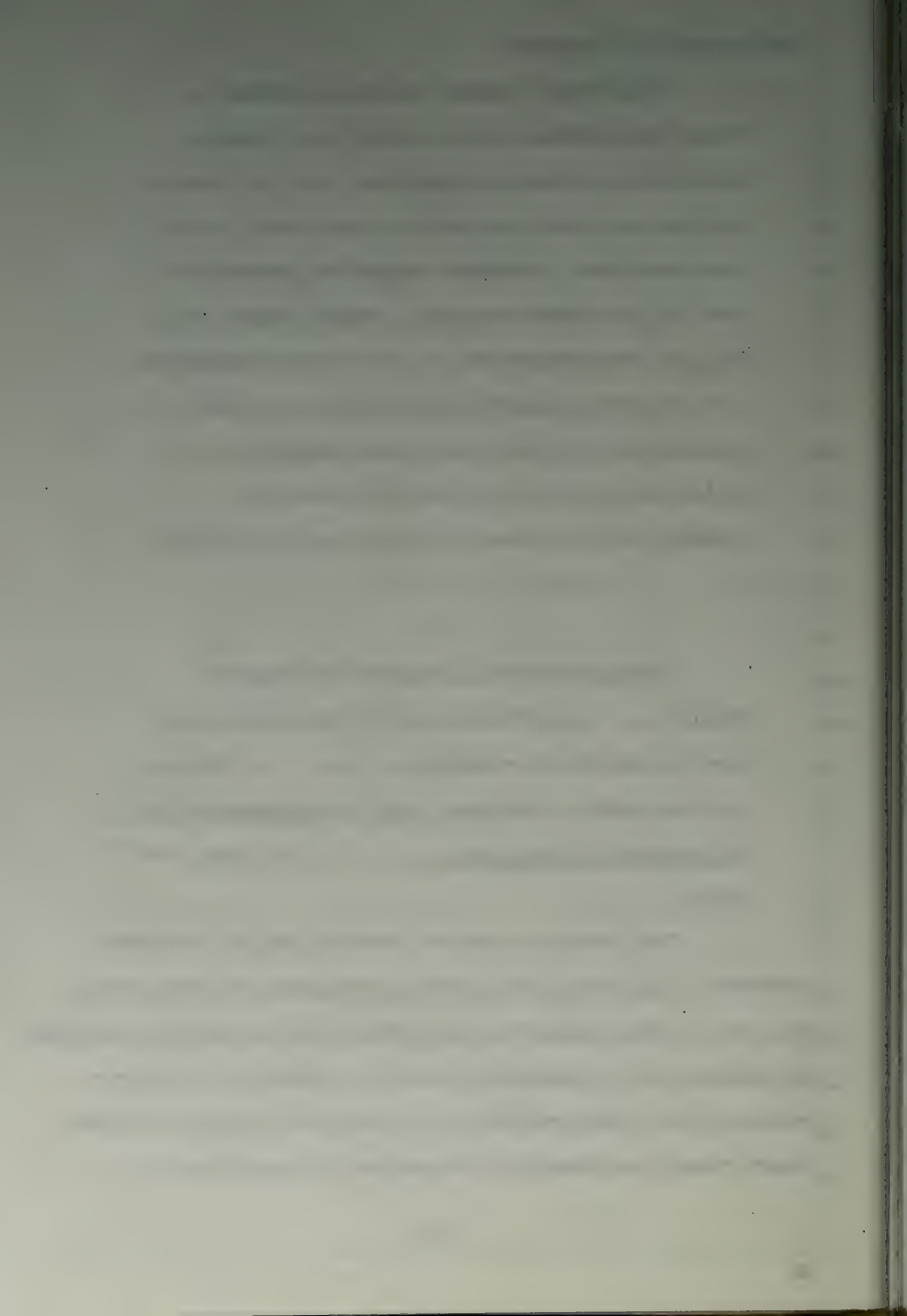
1, that under his proposal:

2 "Any union against which a charge is
3 made, and against which relief is sought,
4 will have greater protection, will be granted
5 notice and full hearing in open court under
6 our amendment, whereas under the provision
7 now in the Committee Bill, which wipes out
8 all of the safeguards of the Norris-LaGuardia
9 Act and the Clayton Act, there is no such
10 guarantee of notice and open hearing. I
11 think we go a little further than the
12 Committee Bill does." (93 Cong. Rec. 5037).

13 * * *

14
15 "The provision [proposed by Senator
16 Ball] . . . is identical with the provision
17 now in the Norris-LaGuardia Act. It requires
18 notice, public hearing, and cross-examination of
19 witnesses in open court . . ." (93 Cong. Rec.
20 5039).

21 The Senate rejected Senator Ball's proposed
22 amendment (93 Cong. Rec. 5055), adopting instead, that
23 Section of the committee bill which was ultimately enacted
24 as Section 10(1) and which does not require as a pre-
25 requisite to the granting of injunctive relief that the
26 court hear "testimony of witnesses in open court".



1 Thus, Section 10(1) can in no way be considered
2 as embodying more stringent procedural requirements than
3 are contained in Rule 65. If anything, the very opposite
4 is true.

5 "In a matter of this character
6 [Section 10(1) proceeding] where the injunction
7 is sought in aid of an administrative procedure
8 provided by the Congress, the usual hesitance
9 of courts to grant temporary injunctions
10 [citation omitted] does not come into play.
11 For here, as stated by the Supreme Court in
12 a noted case, the

13 'standards of the public interest
14 not the requirements of private litigation
15 measure the propriety and need for
16 injunctive relief in these cases.'

17 Hecht Company v. Bowles, 1944, 321 U.S. 321,
18 313, 64 S.Ct. 587, 592, 88 L.Ed. 754."

19 (Kennedy v. Los Angeles Joint Executive Board
20 of Hotel and Restaurant Employees, 192 F.Supp.
21 339, 341 (S.D.Cal. 1961).

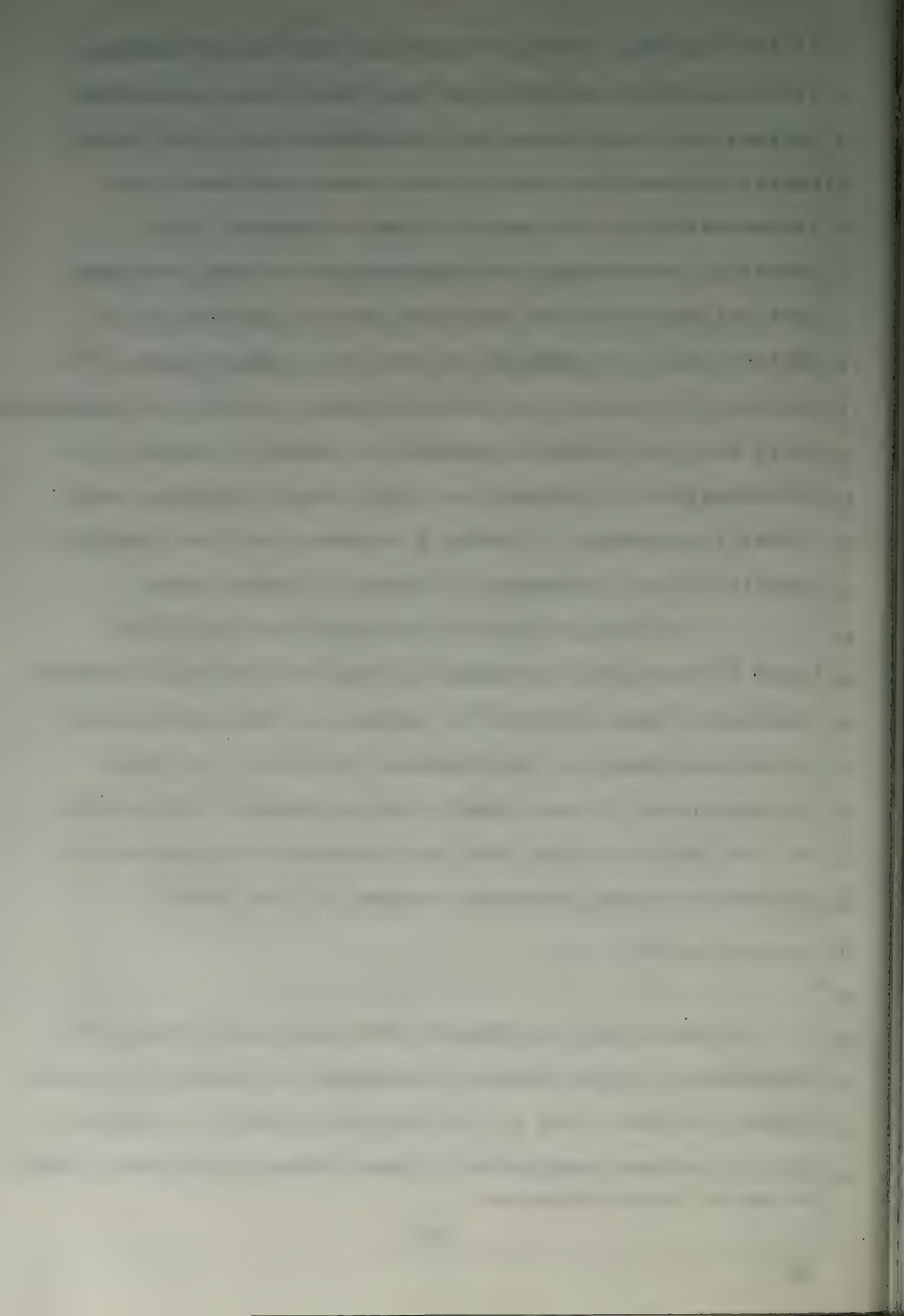
22 Ultimately, Appellants contend that discretionary
23 denial of their request for the presentation of oral
24 testimony was tantamount to making the Court below a mere
25 rubber stamp for the Regional Director. But as we have
26 seen, the Court below was required to issue the injunction

1 if the Regional Director's petition and the affidavits
2 filed therewith demonstrated that there were substantial
3 factual and legal issues for determination by the Board.
4 Merely because the Court in this case could make that
5 determination on the basis of the affidavits filed,
6 rendering unnecessary the presentation of oral testimony,
7 does not mean that the district court's function in a
8 Section 10(1) proceedings is that of a rubber stamp. Its
9 function is limited, but no more than is that of an appellate
0 court which is bound to confine its scope of review to a
1 determination of whether the trial court's findings were
2 "clearly erroneous". Having a narrowly confined judicial
3 function is not tantamount to being a rubber stamp.

4 In sum, it was not necessary for the Court
5 below to hear oral testimony in order to determine whether
6 reasonable cause existed for issuance of the preliminary
7 injunction sought by the Regional Director. In these
8 circumstances, it was clearly not an abuse of discretion
9 for the Court to order that all evidence be presented by
0 affidavits unless otherwise ordered by the Court*.

1
2 *

3 Although they did request that the Court compel the
4 attendance of eight adverse witnesses, including five whose
5 affidavits were filed by the District Director, Appellants
6 did not request permission to have evidence presented orally
7 by any of their witnesses.



1 CONCLUSION

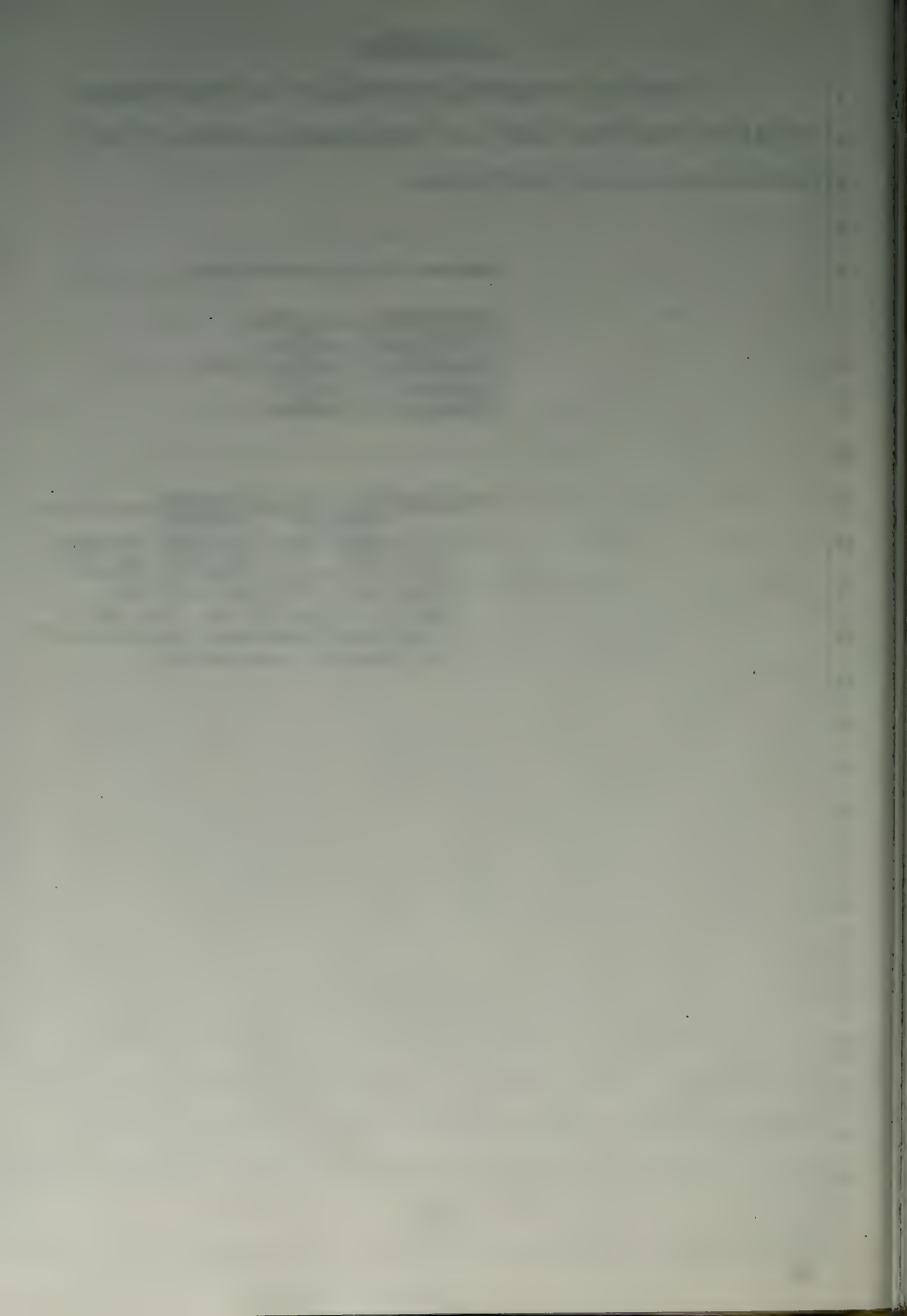
2 For the foregoing reasons, it is respectfully
3 submitted that the order and supplemental order of the
4 Court below should be affirmed.

5
6 Respectfully submitted,

7 McENERNEY & JACOBS
8 O'MELVENY & MYERS
9 CHARLES G. BAKALY, JR.
10 RICHARD C. WHITE
11 CHARLES W. BENDER

12 By CHARLES W. BENDER

13 Charles W. Bender
14 Attorneys for Charging Parties -
15 Appellees, Los Angeles Herald-
16 Examiner, Division of the
17 Hearst Corporation, and San
18 Francisco Examiner, Division of
19 The Hearst Corporation.



CERTIFICATE

I certify that, in connection with the preparation of this Brief, I have examined Rules 18, 19, and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing Brief is in full compliance with these rules.

CHARLES W. BENDER

Charles W. Bender

Attorney for Charging Parties -
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Examiner, Division of The Hearst
Corporation, and San Francisco
Examiner, Division of The Hearst
Corporation

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AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

} ss.

The undersigned, being first duly sworn, deposes and says that:

Affiant is a citizen of the United States and a resident of the county aforesaid; over the age of 18 years and not a party to the within entitled action; that Affiant's business address is 433 South Spring Street, Los Angeles, California.

On May 7, 1968, Affiant served the within BRIEF FOR CHARGING PARTIES - APPELLEES on the Appellants and all other parties in said action, by placing true copies thereof, enclosed in sealed envelopes with postage thereon fully prepaid, in the United States Mail at Los Angeles, California, addressed as follows:

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Los Angeles, California 90005
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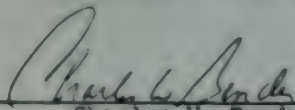
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Los Angeles, California 90015
for and on behalf of Los Angeles
Typographical Union No. 174 and
General Warehousemen's Union Local 598

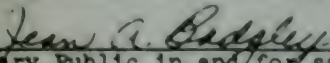
Richman, Garrett & Ansell
Herbert M. Ansell, Esq.
1336 Wilshire Boulevard
Los Angeles, California 90017
for and on behalf of International
Association of Machinists and Aerospace
Workers, District Lodge No. 94

Levy, DeRoy, Geffner & Van Bourg
Leo Geffner, Esq.
1520 Wilshire Boulevard
Suite 801
Los Angeles, California 90017
for and on behalf of Building Service
and Maintenance Employees Union No. 399.



Charles W. Bender

SUBSCRIBED and SWORN to before me
this 7th day of May, 1968.



Notary Public in and for said
County and State

My Commission Expires November 4, 1968

